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No.

IN THE

Supreme Court of the United States

October Term 1999

ELIZABETH CAPROTTI,

Petitioner,

v.

TOWN OF WOODSTOCK *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act, P.L. 102-385, 106 Stat. 1460. Section 635A(a) of that Act, codified at 47 U.S.C. § 555a(a), reads as follows:

> In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer or amendment of a franchise, any relief, to the extent such relief is required by any other provision of Federal, State, or local law, shall be limited to injunctive relief and declaratory relief.

1. Does 47 U.S.C. § 555a(a) pre-empt, under the Supremacy Clause, a private individual's State common-law tort claims for money damages against a franchising authority, arising from a program producer's repeated defamation of her, broadcast over a public access cable television station which the authority operates?

2. Does a franchising authority's willful refusal to stop a public access programmer's defamatory broadcasts, despite the authority's rules and regulations prohibiting it, and despite petitioner's repeated complaints about the broadcasts, constitute "the regulation of cable service" within the meaning of 47 U.S.C. § 555a(a)?

3. Does 47 U.S.C. § 555a(a) affect any of the rights of private persons who are not participants in the cable television industry?

PARTIES TO THE PROCEEDING

The petitioner is Elizabeth Caprotti, for herself and on behalf of her three minor sons, Dylan, John and Matthew Caprotti. She was the plaintiff in the proceedings below.

The respondents are all of the defendants below, except for defendant Ronald Rybacki, against whom a default judgment was entered on July 9, 1996.[1] The claims against him were severed and the action against the remaining respondents proceeded. The respondents are the Town of Woodstock, New York; all of the individual members of its Town Board, named Dale Hughes, Tracy Kellogg, John Mower, Lucille Schecter and Rebecca Wilber; the Woodstock Public Access Committee and all of its individual members, named Barbara Ghebreselassie, Elliot Landy, Sonia Malkine, Lance Smith and Peter Zeissner; and Kay Talbot, the manager of the Woodstock Public Access Cable Television Station.

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[1] Unless the context requires otherwise, "respondents" hereinafter refers to all of the defendants below except for Rybacki.

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On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elizabeth Caprotti, on behalf of herself and her three minor sons, respectfully petitions for a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, entered November 18, 1999

OPINIONS BELOW

The Court of Appeals affirmed by a divided court an order of the New York Supreme Court, Appellate Division, Third Department, entered December 24, 1998. That order affirmed

two orders of the Ulster County Supreme Court, entered May 14 and June 30, 1997, which granted respondents' motion for summary judgment and denied petitioner's motion for reargument and renewal.

The Court of Appeals majority and dissenting opinions are reported at 94 N.Y.2d 73 and 699 N.Y.S.2d 707. The Appellate Division, Third Department opinion is reported at 256 A.D.2d 978 and 681 N.Y.S.2d 911. The opinions of the Ulster County Supreme Court are not reported. All of the opinions are reprinted in the appendix to this petition, at 1a-22a.[2]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), in that the final judgment under review was rendered by the highest State court in which a decision could be had, and the sole question raised is the validity of a "right, privilege, or immunity...specifically set up or claimed under the Constitution or the ..statutes of...the United States. *Id.*

The decision is final, in that it disposes of all claims between the petitioner and the respondents. This petition is timely, being filed within 90 days of the entry of the final judgment on November18, 1999. The judgment is thus within this Court's jurisdiction and is reviewable by writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the United States Constitution, the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992 (collectively

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[2] References denoted "a" are to pages in the appendix.

"the Cable Acts" and codified in Subchapter V-A of Title 47, U.S.C.), and the regulations of the Town of Woodstock Public Access Committee, are set forth in the appendix, at 23a to 32a. The statute at issue, 47 U.S.C. § 555a(a), is set out in full on the first page of this petition, the Questions Presented.

STATEMENT OF THE CASE

This is a State common-law tort action for defamation, negligence and the intentional infliction of emotional distress. The facts are completely undisputed.

Petitioner Elizabeth Caprotti is a hairdresser who owns and operates her own salon in Woodstock, New York. She lives there with her three teen-aged sons. Between 1991 and 1995, one Ronald Rybacki produced a program on Woodstock's local public access cable television station, broadcasting live on Mondays from 10 p.m. to midnight. During those years, often since then, and even as this petition was being prepared, he engaged in a near-weekly series of false and defamatory verbal attacks upon her and her sons, usually in abusive, vicious and indecent language.

The station is owned by non-party Kingston Cablevision, Inc., and operated by the respondent Town of Woodstock, pursuant to a 1986 franchise agreement between them. The station is managed by the respondent Woodstock Public Access Committee ("WPAC") and its individual members, who are appointed by the Woodstock Town Board. They control access to and programming on the station.

Among other statements, Rybacki said on his programs that petitioner was "a liar," "sick and evil," "a drug addict," "a bisexual," "sexually twisted," "capable of murder," and that "[e]veryone should boycott" her place of business. He also said that she "sticks a needle in her arm," that "she likes to seduce you, then murder you," and that "Elizabeth sick fucking Caprotti you know what you can do? You can take your scissors and

shove them up your sick fucking ass. That's what you can do with them." Of petitioner's son John, Rybacki said that he "provokes trouble and is a troubled kid. He has problems in school." Rybacki also said, "I will be talking about this forever."

These false, defamatory and scurrilous utterances were broadcast to the entire community in which petitioner and her sons live and work, and were devastating to their reputations and emotional well-being. People questioned her regarding the truth of the broadcasts, her sons were taunted in school, and her business was adversely affected. She was questioned as to whether she had AIDS.

Criminal harassment proceedings were brought against Rybacki, and petitioner obtained an order of protection prohibiting him from discussing her on the program, but he continued to do so.

Shortly after the broadcasts began, petitioner approached the chairman of the Woodstock Town Board, respondent John Mower, and asked him to take action to stop Rybacki's defamatory programs. He refused. Thereafter, she repeatedly remonstrated with other respondent town officials to remove Rybacki from the air, or at least to prevent him from speaking about her and her children.

However, despite her increasingly frequent and urgent requests for help from the respondents; despite WPAC's regulations prohibiting broadcasting of libel and slander (32a); despite other programmers having been disciplined and removed from the air for far less serious improprieties; and despite their full knowledge of Rybacki's ongoing defamation and its grave effects upon petitioner and her family, the respondents willfully refused to take any action to stop it.

In March 1995, the matter was reported in *The Woodstock Times*, the local newspaper. The article quoted Rybacki as saying of petitioner, "[s]he has a death wish. Something is going to happen to her" and "[m]aybe I hate her and want to kill her." (34a). The article also said that he "equates his situation

with the persecution of the Jews under the Nazis." (36a). The entire article is reprinted at 33a to 37a.

THE PRESENT ACTION

On July 1, 1995, petitioner, on behalf of herself and her three minor sons, commenced a State common-law tort action against Rybacki, the Town of Woodstock, the WPAC and all of their individual members, in the New York Supreme Court, Ulster County. The complaint contained seven causes of action, for defamation, negligence and the intentional infliction of emotional distress, and it demanded compensatory and punitive damages and an injunction against further defamation. The respondents answered but Rybacki did not, and a default judgment was entered against him on July 19, 1996.

Respondents have never disputed throughout this litigation:

- The defamatory nature of Rybacki's utterances;
- The facts and circumstances of their publication;
- That they knew of the broadcasts;
- That they provided the means by which they were broadcast;
- That they refused to remove Rybacki from the air, or to stop him from speaking about petitioner and her sons, although they had the right and the power to do so;
- That WPAC's regulations prohibited the broadcasting of libel and slander on the public access channel;
- That they were "publishers" of the defamatory statements under New York common law, and would otherwise be jointly liable to petitioner.

On January 6, 1997, the respondents moved for summary judgment dismissing the complaint, on the sole ground that 47 U.S.C. § 555a(a) was a complete defense to petitioner's claims. Petitioner cross-moved for summary judgment in her favor. Respondents raised no other defenses to liability.

The Decisions of the Ulster County Supreme Court

On May 12, 1997, the Ulster County Supreme Court granted respondents' summary judgment motion and denied petitioner's cross-motion, stating:

> The actions of such Defendants with respect to the conduct of Defendant Ronald Rybacki here complained of, come completely within the purview of 47 U.S.C.A. 555a in that it protects such Defendants with respect to any claim made against them in circumstances such as are here involved and limits the relief to injunctive relief. Inasmuch as Defendant Ronald Rybacki is no longer broadcasting with Woodstock Public Access Cable Television Station, no further relief can be afforded to plaintiffs. (20a).

Petitioner then moved for reargument and renewal, because the Court had not addressed Rybacki's default, and because the respondents had allowed him to return to the air and he was continuing to defame the petitioner. On June 30, 1997, the Court adhered to its prior determination. (21a).

Petitioner appealed from both orders to the Supreme Court, Appellate Division, Third Department. The appeal was heard on November 9, 1998.

The Decision of the Appellate Division, Third Department

On December 24, 1998, the Appellate Division unanimously affirmed the lower court (17a-19a). It said in pertinent part:

> [P]laintiffs' claim arises from the regulation of cable services as it is predicated upon the Town and WPAC's alleged failure to comply with the applicable rules and regulation governing the station's operation. Although plaintiffs' 1st Amendment rights were not abridged by

> defendants, the statute should nonetheless be applicable to them since the ability of a public access channel to provide a forum for robust and unrestrained public discourse would be jeopardized if viewers allegedly damaged by such programming could seek monetary damages from franchising authorities. In any event, we note that 47 USC § 555a applies to "any claim." Accordingly, we conclude that plaintiffs may not seek monetary damages from the Town or WPAC. (19a).

The Decision of the Court of Appeals

Petitioner then moved for leave to appeal to the Court of Appeals, New York's highest Court. The motion was granted on April 6, 1999[3]. The appeal was heard on September 15, 1999 and the Court issued its decision on November 18, 1999.

In a split 5-1 decision, the Court of Appeals affirmed the Appellate Division, on the sole ground that 47 U.S.C. § 555a(a) was a complete defense and pre-empted petitioner's claims. The majority stated in pertinent part as follows:

> The issue before us is whether plaintiffs' tort claim, which is predicated on the municipal defendants' decision to allow Rybacki to continue broadcasting defamatory speech, "aris[es] from the regulation of cable service" and is therefore defeated by the immunity provision.
>
> By its plain and unconditional terms, § 555a (a) grants a local municipality broad immunity from monetary liability that arises out of "any" of the municipality's regulatory decisions involving cable television. We hold that the municipal defendants made a regulatory decision when they allowed Rybacki to continue on the air in the

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[3] 93 N.Y.2d 805, 689 N.Y.S.2d 429.

face of persistent complaints. Although we are mindful of the undisputed defamatory nature of Rybacki's broadcasts, our role is not to decide whether the municipality's decision was a good one; our focus is limited to whether the municipality "regulat[ed]" cable service, and we conclude that it did.

By statutory grant, the municipality is vested with authority to address allegedly defamatory programming. Based on that authority, the municipality promulgated what it aptly called "Regulations." By deciding to permit Rybacki to continue his broadcasts on their public access channel, the municipal defendants were engaged in "regulation" of cable service to no less a degree than had they stopped him.

Nothing in § 555a (a)'s legislative history diminishes the breadth of the immunity conferred by the statute's plain terms...If Congress was concerned exclusively with immunity from suits by aggrieved cable operators, it would not have deliberately enacted the additional immunity from any claims "arising out of the regulation of cable service."...

We...rest our determination on the plain language of § 555a (a)... [which] leaves no room for guesswork or interpretation. Preemption is not implied; it is express. (5a-6a)(footnotes, citations and quotation marks omitted).

The majority cited *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395 (8th Cir.1997), which held that § 555a(a) barred a public access program producer from recovering money damages on a 42 U.S.C. § 1983 claim, against a franchising authority which had removed him because of his defamatory broadcasts. The majority said that there was "no meaningful distinction between *Coplin* and the case at bar. If cable television may be likened to a faucet of public information, one regulates the faucet no less by deciding to let it run than by turning it off." (7a).

Judge Levine's Dissent

Judge Howard Levine wrote a lengthy and closely argued dissenting opinion which is difficult to summarize briefly. He said that it was undisputed that respondents had the right to remove Rybacki in response to petitioner's repeated requests, and that their refusal to stop his "constitutionally unprotected expressions" caused petitioner to suffer "personal anguish, public humiliation and economic loss of beauty shop clientele from his televised attacks over that lengthy period." (8a).

The dissent then said that:

1. The majority had "ignore[d] principles of statutory interpretation the Supreme Court has imposed in applying the Supremacy Clause";

2. The finding of express pre-emption was "contrary to United States Supreme Court canons of construction in this sensitive area of constitutional federalism";

3. The majority's "expansive reading of section 555a (a) finds no support in the legislative history" and Congress did not intend to pre-empt common-law tort remedies within the historic police powers of the State;

4. The absence of any explicit reference to common-law actions in the statute meant that there was no express pre-emption;

5. The statute was "manifestly far from plain, and its ambiguity works heavily against preemption." (9a-11a).

The dissent further said that "[t]aken literally, plaintiffs' damage claims do not 'arise[] from the *regulation* of cable service.' Rather, their injuries arose from the *absence* of defendants' regulation of Rybacki's defamatory expressions," and that this Court, in *Freightliner Corp. v. Myrick*, 514 U.S. 280, had "specifically rejected the contention that the absence of regulation itself constitutes regulation," (11a; emphases in original).

The dissent further said that § 555a(a) did not apply to damage claims "by private individuals who are not themselves

subject to regulation by a franchising authority." (12a). Moreover, the franchising authority had:

> some power to regulate the content of all cable programming through the franchise agreement and their regulations respecting "cable services [that] are obscene or otherwise unprotected by the Constitution" (47 U.S.C. § 544[d][1]). Therefore, to that degree, franchising authorities can also exert regulatory control over cable television performers, programmers and producers. It is all of these cable industry participants who section 555a (a) was intended to bar from suing for damages "arising from [their] regulation" by franchising authorities, not private parties who are not subject to any regulation under the Cable Acts. (*id.*).

The dissent further said that there was a specific immunity for *cable operators* from liability for defamation claims for public access programs, contained in 47 U.S.C. § 558 (31a), but that the immunity was not given to *franchising authorities*. The reason for the distinction was that cable operators were prohibited from exercising any editorial control whatsoever, whereas franchising authorities *had* such control so long as they did not violate the First Amendment:

> Congress therefore had every reason to leave franchising authorities accountable in damages for failing to exercise control over defamations on public access channels. It is quite apparent that the omission of franchising authorities from immunity for defamation liability in section 558 was intentional. The inclusion of cable operators but omission of franchising authorities in the only section of the Cable Acts dealing specifically with immunity from defamation liability adds a powerful *expressio unius est exclusio alterius* argument against the majority's application of section 555a (a) to give

franchising authorities immunity from State defamation liability. (13a).

The dissent reviewed the Congressional history, including the differences between the House and Senate bills. Quoting from the House Report and the Congressional Record, the dissent said that "the singular purpose of both Houses of Congress" was "to protect local authorities from being pressured into making unmeritorious franchising decisions by the threat of expensive damages litigation by cable companies," and "to prevent 'strike' damage suits against local franchising authorities by disgruntled persons or corporate entities in the cable television industry who are subject to franchising decisions 'or otherwise regulate[d]' by those municipal authorities." (14a).

The dissent quoted from the other Circuit Court opinions which had construed § 555a(a)[4], and distinguished *Coplin*, *supra*, relied upon by the majority. In *Coplin*, the plaintiff had sued under 42 U.S.C. § 1983, but had not asserted any State common-law causes of action for damages:

> Thus, the court in *Coplin* could, if it wished, apply the plain meaning doctrine to 47 USC § 555a (a), free from the federalism-based constitutional constraints imposed by the Supreme Court where, as here, State common-law remedies are claimed to be superseded. Second, *Coplin* was a producer and programmer on the public access channel, and as such he was subject to content regulation by the franchising authority. Thus, dismissal of his section 1983 damages action was completely consistent with a reading of section 555a (a) limiting its application to bar damage suits by persons or entities

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[4] These cases are cited and discussed *infra* at 25-6.

subject to regulation by a franchising authority, and adversely affected by such regulation. (15a).

Finally, the dissent said that "defendants have completely failed to demonstrate any clear and manifest purpose of Congress to preempt plaintiffs' State common-law defamation damages action." (16a)(quotation marks omitted).

REASONS FOR GRANTING THE WRIT

1. Defamatory speech about private individuals, outside the context of issues of public interest or importance, has no First Amendment protection whatsoever. Vindication of the reputations of defamed private persons by awarding money damages is within the historical police power of the States, and is a right entitled to substantial protection.

2. A party asserting Federal pre-emption of State law bears a heavy burden to overcome the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action" and "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)(citation and quotation marks omitted).

The majority holding conflicts with "United States Supreme Court canons of construction in this sensitive area of constitutional federalism," as the dissent said (9a). That conflict is alone sufficient reason to grant the writ. *See William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 14 (1974)(certiorari granted "to decide whether the holding of the Florida Supreme Court was consistent with the decisions of this Court"); *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72 (1974)(certiorari granted "[b]ecause the decision appeared to be in conflict with applicable decisions of this Court").

3. Section 555a(a) was intended solely to bar damage suits brought by cable system operators objecting to regulatory decisions made by franchising authorities. In 1992, Congress found that such suits were frustrating its public policy to encourage the growth and development of cable television in the nation. 47 U.S.C. § 521 (23a). The statute has nothing to do with tort claims brought by private individuals who are unregulated by the Cable Acts, because such claims do not affect that public policy. The Court of Appeals' interpretation conflicts with those of two Federal Circuit Courts and is contrary to Congressional intent. Such "conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law" are "[a] principal purpose for which we use our certiorari jurisdiction." *Braxton v. United States*, 500 U.S. 344, 347 (1991). "The importance of the case, and the divergent approach of other courts to the issue" are also sufficient, even without a direct conflict. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300 (1986)(footnote omitted).

4. The respondents were not engaged in "regulation of cable service," when they repeatedly refused for years to stop Rybacki's defamatory broadcasts, in willful defiance of their own regulations forbidding them. They were nothing more than common-law tortfeasors, defaming a private citizen while they were *operating*–not regulating–a public access channel. Thus the statute does not apply because there was no "regulation."

5. This Court should clarify the rights of private citizens and the obligations of franchising authorities regarding the content of programs on public, educational and governmental channels. In providing for such channels in 1984, Congress wanted to "provide the widest possible diversity of information services and sources to the public, *consistent with the First Amendment's goal of a robust marketplace of ideas*." H. Rep. No 934, 98th Cong., 2nd Sess. 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (emphasis added). *See* 47 U.S.C. § 521(4) (23a). But defamation, like obscenity, is no part of "a robust marketplace of ideas."

6. The Court of Appeals has now deprived private persons of all right to recover damages for defamation broadcast by a public access station operated by a municipality. The decision thus creates equal protection issues, because it makes a distinction between municipal and private broadcasters (who remain liable), without any rational basis. The decision also creates an absolute privilege to defame a private person *ad infinitum*, a result Congress surely did not intend. Given New York's importance as the nation's media capital, the Court of Appeals' decision will harm defamation plaintiffs throughout the nation without advancing any countervailing public policy.

7. Congress actually made the broadcasting of defamation a crime: "Whoever transmits over any cable system any matter which is obscene or *otherwise unprotected by the Constitution of the United States* shall be fined under Title 18 or imprisoned not more than two years, or both." 47 U.S.C. § 559 (31a) (emphasis added). If broadcasting defamation is a crime, the victims of it are entitled to damages.

8. The case raises "important questions touching the accommodation of state and Federal interests under the Constitution" (*Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65) (1974). It is an opportunity to address significant pre-emption issues at the confluence of cable television, State defamation law and the Supremacy Clause of the Constitution.

POINT I

DEFAMATION CLAIMS BY PRIVATE PERSONS NOT ARISING FROM MATTERS OF PUBLIC CONCERN IMPLICATE NO FEDERAL OR FIRST AMENDMENT INTERESTS. PROTECTION OF REPUTATION IN SUCH CASES IS OF THE HIGHEST STATE INTEREST.

Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has often addressed the constitutional

limitations on State defamation laws. In *Sullivan*, it held that the First Amendment bars defamation claims brought by public officials in the context of matters of public interest, absent a showing of actual malice. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), it held that private citizens who are defamed in that context can recover damages so long as the States do not impose liability without fault[5]:

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues. They belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality....
>
> *The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose*, for as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being–a concept at the root of any decent system of ordered liberty. *The protection of private personality, like the protection of life itself, is left primarily to the individual States under*

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[5] In *Gertz*, this Court granted certiorari "to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen." 418 U.S. at 325. The same consideration justifies its grant in the present case. Respondents admit that they are "publishers" under New York common law (*Youmans v. Smith*, 153 N.Y. 214 [1897]), and would be jointly liable but for § 555a(a). See Annot., *Defamation by Radio or Television*, 50 A.L.R.3d 1311.

States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system....

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. *Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater....*

[A] private individual...has not accepted public office or assumed an influential role in ordering society. He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, *private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.*

For these reasons we conclude that *the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual....*

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual

418 U.S. at 340-347 (citations, footnotes and quotation marks omitted; emphases added).

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), this Court went a step further, and held that defamation of private persons outside the context of issues of public interest did not raise any First Amendment concerns:

> [S]peech on matters of purely private concern is of less First Amendment concern. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent ...
>
> The rationale of the common-law rules has been the experience and judgment of history that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact. As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages –even absent a showing of actual malice.
>
> 472 U.S. at 759-761 (plurality, citations, footnotes and quotation marks omitted).

Petitioner's defamation claims thus raise no First Amendment considerations at all. Protection of her reputation is a substantial right, within the historic police powers of the State of New York. She is a private person who was repeatedly defamed, not during discourse on issues of the day as in *Gertz*, but as the victim of a deliberate campaign of harassment and verbal stalking, in violation of an order of protection. The respondents could have stopped it at once, but instead allowed it to continue for years, even while this case is being litigated.

Petitioner has a powerful claim–indeed the most powerful defamation claim possible, devoid of any privileges or other countervailing policy considerations–upon the Courts of the

State of New York to vindicate her grossly sullied reputation. The Court of Appeals' rejection of petitioner's claims violates Constitutional principles of federalism and pre-emption, long established by this Court.

POINT II

THE COURT OF APPEALS HOLDING CONFLICTS WITH THIS COURT'S WELL-ESTABLISHED PRINCIPLES OF PRE-EMPTION.

Federal laws are "the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2 (23a). In determining whether State laws are pre-empted by Federal laws, the question is ultimately one of Congressional intent.

Four recent cases from this Court address Federal pre-emption of State laws.[6] The cases are *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994); and *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). They establish the following principles:

1. There is a strong presumption against pre-emption of State common-law causes of action, particularly when they involve health and safety, the traditional police powers of a State, or claims which historically were brought in State common-law courts. Such claims are not to be pre-empted "unless that was the clear and manifest purpose of Congress." *Medtronic, Inc., supra*, 518 U.S. at 485 (citation and quotation marks omitted).

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[6] In the pre-emption context, "State laws" means State common law as well as positive legislative statutory enactments. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 at 522 (plurality).

2. Any such pre-emption is to be as narrow and limited as possible, and any ambiguity in the statute is be construed against pre-emption. *Cipollone, supra*, 505 U.S. at 518.

3. Absent express pre-emptive language, State laws will be impliedly pre-empted only "if Congress intended federal law to occupy a field exclusively or where state law is in actual conflict with federal law [or] where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Myrick, supra*, 514 U.S. at 287 (citations and quotation marks omitted).

In *Medtronic, Inc., supra*, this Court said:

> Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption.
>
> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated...in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, we used a presumption against the pre-emption of state police power regulations to support a narrow interpretation of such an express command in *Cipollone*. That approach is consistent with both

> federalism concerns and the historic primacy of state regulation of matters of health and safety.
>
> Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U. S. 96, 103 (1963), that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.
>
> 518 U.S. at 484-86 (citations and internal quotation marks omitted; italics in original).

These principles are central to our Constitutional system of federalism and their scrupulous observance assures the preservation of that system. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Moreover, where pre-emption would leave injured individuals without any state or federal remedy at all, a court can find it only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990) (nuclear plant worker's emotional distress claim not pre-empted despite extensive Federal regulation of industry); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)(same; tort claim for radiation injuries: "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

Petitioner's reputation is entitled to substantial protection pursuant to State law (*Gertz* and *Dun & Bradstreet, supra*).

Given the lack of any Congressional intent to pre-empt defamation suits–or any common-law tort claims–the Court of Appeals majority's holding conflicts with this Court's pre-emption cases, and leaves petitioner without a remedy.

POINT III

THE FEDERAL GOVERNMENT'S REGULATION OF CABLE TELEVISION IS NOT EXCLUSIVE, AND STATE AND FEDERAL LAW DO NOT CONFLICT. THUS THERE IS NEITHER FIELD PRE-EMPTION NOR CONFLICT PRE-EMPTION

There is a "fluid and ever-changing balance between state and Federal authority over cable television." *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91, 97 (2nd Cir.1992). Congress intended to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3)(23a). Thus, there is no basis to infer field pre-emption of petitioner's claims.

Moreover, 47 U.S.C. § 556(a)(30a) says that "[n]othing in this subchapter shall be construed to affect any authority of any State, political subdivision or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter." This is specific language against any pre-emption.

The case law shows the limited Federal role in cable television regulation, and the lack of any general Congressional pre-emptive intent. States and localities can mandate access by cable operators to apartment buildings,[7] impose a gross receipts

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[7] *AMSAT Cable Ltd. v. Cablevision of Connecticut Limited Partnership*, 6 F.3d 867, 875-6 (2nd Cir.1993).

tax,[8] impose a rate freeze,[9] prohibit monopolization,[10] prohibit "infomercials" containing false and misleading advertising,[11] prohibit "negative option billing," *i.e.*, billing for services not affirmatively requested by subscribers,[12] grant eminent domain powers,[13] and limit "downgrade" charges for customer-requested reductions in service.[14]

Thus, given the historical mix of regulation by Federal, State and local governments, there is no Federal role so pervasive that the enforcement of state defamation law is "an obstacle to the accomplishment of the full purposes and objectives of Congress." *Finneran, supra*, 954 F.2d at 98. Accordingly, there is neither field nor conflict pre-emption: there is no Congressional intent to occupy the field exclusively, and it is not impossible to enforce both state and federal law at the same time.

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[8] *Medlock v. Leathers*, 842 S.W.2d 428, 311 Ark. 175 (1992), *cert.den.* 508 U.S. 960.

[9] *Town of Norwood v. Adams-Russell Co., Inc.*, 519 N.E.2d 253, 401 Mass. 677 (1988).

[10] *Storer Cable Communications v. City of Montgomery, Ala.*, 806 F.Supp. 1518 (M.D.Ala.1992).

[11] *State of Texas v. Synchronal Corp.*, 800 F.Supp. 1456 (W.D.Tex.1992).

[12] *Time Warner Entertainment Co., L.P. v. F.C.C.*, 56 F.3d 151, 194 (C.A.D.C.1995), *cert.den.* 516 U.S. 1112.

[13] *Cablevision of the Midwest, Inc. v. Gross*, 639 N.E.2d 1154, 70 Ohio St.3d 541 (1994).

[14] *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91 (2nd Cir.1992).

POINT IV

THE MAJORITY HOLDING DENIES PETITIONER EQUAL PROTECTION, BECAUSE IT CREATES A DISTINCTION WITHOUT A RATIONAL BASIS.

In *Denver Area Educational Telecommunications Consortium, Inc. v. F. C. C.*, 518 U.S. 727 (1996), this Court addressed the problem of indecent programming on public access channels, particularly with respect to children, and noted the variety of regulatory mechanisms:

> Public access channels, on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements...Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner...Access channel activity and management are partly financed with public funds–through franchise fees or other payments pursuant to the franchise agreement, or from general municipal funds ...and are commonly subject to supervision by a local supervisory board.
>
> This system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services. And this system can police that policy by, for example, requiring indemnification by programmers, certification of compliance with local standards, time segregation, adult content advisories, or even by pre-screening individual programs...Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels,

> or are merely available to respond when problems arise, the upshot is the same: there is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community.
> 518 U.S. 727 at 761-63 (plurality)(citations omitted).

The protection of the reputations of private persons and their right to be free of emotional distress are State interests just as compelling as the protection of children from indecent material. The "locally accountable body" must be just that, and must be liable for damage to reputation, whether it acts negligently or, as here, willfully and with deliberate indifference, and regardless of its legal structure.

It cannot matter whether the body is private, public or has elements of both, because a defamed person's right to recover should not depend upon the nature of the ownership or control of the station which publishes the defamation. Such a distinction violates equal protection because it is arbitrary and without a rational basis.[15] The Court of Appeals majority's interpretation makes the statute unconstitutional as applied, and such an interpretation is obviously to be avoided.

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[15] The equal protection aspects of § 555a(a) were challenged by a cable system operator in *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, *infra* at 25, 80 F.3d at 327. However, the issue here is *petitioner*'s equal protection rights, not the cable operator's.

POINT V

THE MAJORITY'S INTERPRETATION OF § 555a(a) CONFLICTS WITH TWO U.S. CIRCUIT COURT CASES, AND THE STATUTE'S LIMITED PURPOSE.

The Court of Appeals majority's interpretation of § 555a(a) conflicts with the uniform interpretations of the Ninth Circuit in 1996, the District of Columbia Circuit in 1996, and the District Court for the District of Columbia in 1993. All three Courts held that the sole purpose of the statute was to protect local franchising authorities from damage suits brought by aggrieved cable system operators over franchising decisions.

The sponsor of § 555a was Senator and then-Representative Charles Schumer. He said the following on the House floor:

> The amendment is needed to protect local authorities from being pressured into making unmeritorious franchising decisions by the threat of expensive damages litigation by cable companies. This is not just a hypothetical threat: In Los Angeles, a multimillion dollar suit has been filed against the local authority over past franchising decisions, in an attempt to extort a lucrative settlement and to influence future franchising decisions by that and other local authorities.
> 138 Cong. Rec. H6530 (daily ed. July 23, 1992).

The Courts have said exactly the same thing: "So far as we can tell, Congress gave local franchising authorities protection in order to insulate their decisionmaking from the threats of suits for damages *brought by disappointed cable operators.*" *Time Warner Entertainment Co., L.P. v. Federal Communications Commn.*, 93 F.3d 957, 980, *reh. en banc den.* 105 F.3d 723 (D.C.Cir.1996)(emphasis added).

In *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir.1996), the Court said:

> Congress found that, prior to passage of section 555a(a), municipalities were facing unexpected and potentially crippling civil damage liability claims in relation to their regulation of cable operators. In response, Congress exempted municipalities from civil damages liability arising out of the local regulation of cable services in order to preserve the municipal franchising and regulation scheme envisioned by the [Cable Communications Policy Act of 1984]. We conclude that section 555a(a) promotes Congress's substantial interest in having municipalities regulate cable operators without fear of potentially overwhelming damage awards. 80 F.3d 320, 326 (footnote, citation and quotation marks omitted; brackets in original).

"Congress found that claims against municipalities for civil damage liability *related to their regulatory activities of the cable industry* were posing a potentially crippling burden on local governments...Elimination of that exposure is thus designed to preserve the municipal franchising and regulations scheme envisioned by the 1984 Act." *Daniels Cablevision, Inc. v. United States*, 835 F.Supp. 1, 11-12 (D.C.D.C. 1993), *aff'd sub nom. Time Warner Entertainment Co., L.P.v. F.C.C.*, 93 F.2d 957 (emphasis added; quotation marks omitted).

The Court of Appeals majority extended § 555a(a) far beyond its intended purpose. This petition should be granted so that this Court can have the final word on the correct interpretation of the statute.

POINT VI

COPLIN SUPPORTS PETITIONER, BECAUSE IT HOLDS THAT DEFAMATION ON A PUBLIC ACCESS STATION CAN BE REGULATED.

The Court of Appeals majority cited *Coplin, supra*, 111 F.3d 1395, to support its holding against petitioner. However, they ignored what the Eighth Circuit went on to say:

> [B]ecause Coplin was banned from FPATV for the content of his show, the actions of the FPATV Committee and the Council are presumptively invalid. This presumption is not irrebuttable, however. Our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Because these limited areas of speech, which include, for example, obscenity, are of such slight social value, they can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*...We agree that defamation of a private individual is a form of speech that can be regulated because of its constitutionally proscribable content.
>
> *Coplin, supra*, 111 F.3d at 1401-02 and 1406 (citations, brackets and internal quotation marks omitted; italics original).

Thus, *Coplin* supports *petitioner*, because it holds that a franchising authority can stop the broadcasting of defamation without liability to the *speaker*. Thus, the respondents could have removed Rybacki from the air at any time. Yet they refuse to this day to do so, and actually claim that he has a First Amendment right to continue to defame the petitioner.

A public access program producer has a qualified First Amendment right to speak, albeit not on a public access cable television station.[16] However, a programmer has no right to defame a private individual, and a franchising authority has no right to facilitate and publish the defamation. *Coplin* holds that a programmer cannot recover money damages under 42 U.S.C. § 1983 when he is removed for defamatory speech.[17] However, *Coplin* says nothing about the *rights of the person defamed.*

The *Coplin* Court said, "Although we agree that, in most circumstances, holding up the sexual activities of a specific private individual to public ridicule is not a legitimate concern of public interest and that doing so is highly offensive, the record reveals nothing about the occupants of the residences in question." 111 F.3d at 1405. Thus, the Court could not have addressed the rights of the unknown persons who were defamed. The "highly offensive" speech in this case was far worse than in *Coplin*, because it defamed an identified individual. To extend the metaphor likening "cable television....to a faucet of public information," no responsible franchising authority would "let it run" (7a) if the "water" were polluted.

Other cases hold that obscene or defamatory speech on cable television may be regulated. *Loce v. Time Warner Enter-*

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[16] In *Denver Area, supra*, a plurality of this Court said that "[w]e therefore think it premature to answer the broad [question]...whether public access channels are a public forum." 518 U.S. at 742. See the extensive discussion of the point in *Coplin, supra*, 111 F.3d at 1402 n. 4 and in *Arkansas Educ. Television Commn. v. Forbes*, 523 U.S. 666 (1998)(state-owned public television station could exclude independent political candidate from debates without violating First Amendment; station was not a public forum). The question remains open, and the present case is an appropriate one in which to answer it.

[17] *See Jersawitz v. People TV*, U.S.Dist.Lex. 16274 (N.D.Ga.1999)(§ 555a [a] barred programmer's damage claims arising from criminal trespass charges; station was not a public forum and did not violate his First Amendment rights in removing him).

tainment Advance/Newhouse Partnership, 191 F.3d 256 (2nd Cir.1999), upheld the right of a private cable operator to refuse to broadcast indecent programs on a leased access channel, citing 47 U.S.C. § 532(h), which says that a franchising authority can prohibit material that "in the judgment of the franchising authority or the cable operator is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is *otherwise unprotected by the Constitution of the United States*." (emphasis added).

Loce involved a leased access channel under § 532, while the channel here is a public access channel under § 531. However, cable operators and franchising authorities have the right to prohibit constitutionally unprotected speech on both. *Compare* § 531(e)(27a), § 532(h)(27a-28a) and § 544(28a).[18]

In *McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161 (2nd Cir.1998), the Court held that a public access programmer had a claim under § 531(e) for being removed from the air because of his sexually explicit–but not unconstitutionally obscene–programs. However, the Court refused to adjudicate the rights of two plaintiffs who had asserted only a right to view the programs. 149 F.3d at 164 n 5.[19]

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[18] *Cf. Goldberg v. Cablevision Systems Corp.*, 69 F.Supp.2d 398 (E.D.N.Y.1999)(cable operator could prohibit public access programmer from offering on air to sell tapes and transcripts of his programs).

[19] The *McClellan* Court noted the distinction between leased access channels and public access channels drawn by a plurality of this Court in *Denver Area, supra*. The former were created by Congress in 1984, but the latter were creations of state and local governments and had existed long before then. 149 F.3d at 167. This distinction is another argument in favor of "locally accountable bodies" having exclusive control of–and thus responsibility for–public access channels, and against any implicit Federal pre-emption of claims arising from their operation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
February 10, 2000

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APPENDIX

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Opinion of the New York State Court of Appeals
74 N.Y.2d 37, 699 N.Y.S.2d 707 (1999)

Elizabeth Caprotti, Individually and as Parent of John Caprotti, et al., Infants, Appellants, v Town of Woodstock et al., Respondents, et al., Defendant.
Argued September 15, 1999; decided November 18, 1999

Richard A. Altman, for appellants.
Marsha Solomon Weiss, for respondents.

OPINION OF THE COURT

ROSENBLATT, J.

In this common-law defamation action, plaintiffs seek compensatory and punitive damages against a municipality, alleging that they were defamed by an independent programmer on the municipality's public access television channel. The issue before us is whether 47 USC § 555a (a) immunizes the municipality from liability for monetary damages. Under that section, immunity extends to any claim against a municipality "arising from the regulation of cable service." We conclude that plaintiffs' claim arises from the regulation of cable service, and therefore uphold dismissal of the complaint against the municipality.

Facts and Procedural History

Defendant Town of Woodstock (the municipality) granted non-party Kingston Cablevision, Inc., a franchise for the construction and operation of a cable television system. In the franchise agreement, Kingston Cablevision agreed to provide public access capability to the municipality.[1] The agreement

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[1] In 1984, Congress enacted the Cable Communications Policy Act (continued...)

further provided that "[r]ules and regulations for use of the public access capability shall be promulgated by [the municipality]."

In accordance with that provision, the municipality promulgated regulations (the Regulations) and delegated management of the channel to defendant Woodstock Public Access Committee (the WPAC), a body consisting of five people chosen by the municipality's Town Board. Among the Regulations is a provision prohibiting the presentation of material that constitutes libel, slander or invasion of privacy. The municipality's Regulations further provide that "[w]hen program violations are brought to the attention of the WPAC, it may take such steps that are necessary to comply with WPAC regulations, and applicable local, state and federal laws and regulations."

Shortly after the public access channel began broadcasting, Ronald Rybacki produced and appeared in his own weekly television program on its airwaves. Plaintiff Elizabeth Caprotti, who had briefly dated Rybacki, alleges that he used his program to wage a vicious campaign of harassment against her by repeatedly defaming her and her three sons–also plaintiffs in this action–on television. Plaintiffs assert that despite their complaints to members of the municipality's Town Board and WPAC, the municipality refused to stop Rybacki's defamatory broadcasts, and thereby willfully failed to comply with the Regulations. The nature of these allegations is not in dispute. Indeed, Rybacki reportedly was prosecuted criminally for harassing the plaintiffs, and an order of protection was issued against him prohibiting him from discussing plaintiffs on the air.

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[1](...continued)
(Pub L No. 98-549, 98 Stat 2779 *et seq.* [codified as amended in scattered sections of 47 USC]), which expressly permits a "franchising authority" (i.e., a local municipality empowered to grant a cable television franchise) to include in its franchise proposal to a cable operating company a statement that the municipality reserves channels for public, educational or government use (47 USC § 531).

Plaintiffs sued the municipality, members of its Town Board, the WPAC, members of the WPAC, the channel's station manager (collectively, the "municipal defendants") and Rybacki, seeking compensatory and punitive damages for common law defamation. Rybacki defaulted, and a judgment was entered against him. Supreme Court held that 47 USC § 555a (a) clothed the municipal defendants with immunity from liability for monetary damages, and the Appellate Division unanimously affirmed. We agree with the reasoning of the courts below, and, therefore, affirm.

Statutory Analysis

The Cable Communications Policy Act of 1984 (the "1984 Act") was the first comprehensive federal statute regulating the cable television industry. A stated, primary purpose of the legislation was "to assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" (47 USC § 521 [4]). In keeping with that aim, Congress sought to insure that cable companies devote portions of their systems to programming over which the companies had no editorial control, thereby providing the public with additional avenues of information (*see*, Note, *Denver Area Telecommunications Consortium, Inc. v. FCC And The Public Forum Status Of Cable Access Channels*, 63 Brook L Rev 955, 961-62 [Fall 1997]).[2]

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[2] A "cable operator," is the entity that "provides cable service over a cable system and * * * owns a significant interest in such cable system" (47 USC § 522 [5]). In the case before us, non-party Kingston Cablevision, Inc., is a "cable operator."

In the pleadings and in their brief, plaintiffs refer to the municipality as the cable operator. If we were to consider the municipality as the operator, it would not avail plaintiffs, considering that the municipality as "operator" would be covered by the immunity provision of section 558, which provides that "cable operators shall

(continued...)

The 1984 Act furthered the objective by empowering a local municipality, as franchisor, to require that a cable operating company establish "public access channels" (i.e., channels that are operated by the local municipality and are not controlled by the cable operator).[3] Congress envisioned that public access channels would become "the equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet" ; (HR Rep No. 98-934, 98th Cong, 2d Sess, at 59, reprinted in 1984 US Code Cong & Admin News 4655, 4696).

By placing municipalities in the regulatory arena, however, the 1984 Act exposed them to numerous lawsuits brought by cable companies asserting that their First Amendment rights were violated when they were not awarded municipal cable contracts (*see*, S Rep No. 102-92, 102d Cong, 2d Sess at 48-49, reprinted in 1992 US Code Cong & Admin News 1133, 1181). Thus, when Congress restructured the 1984 Act and passed the

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[2](...continued)
not incur * * * liability for any program carried on any [access channel] * * * unless the program involves obscene material" (47 USC § 558). We base our decision, however, on the immunity provision of § 555a (a).

[3] *See*, 47 USC § 531[b]. The 1984 Act authorizes municipalities to require cable operators to provide two types of "access channels": (1) leased access channels (47 USC § 532), and (2) public access channels (47 USC § 531). Leased access channels are channels that cable operators lease commercially to unaffiliated third parties. On the other hand, public access channels are managed independently by local municipalities. A local municipality is granted a public access channel as a quid-pro-quo for the cable operator being allowed to use the public rights-of-way to construct its cable system (*see*, Note, 63 Brook L Rev, *op. cit.*, at 960).

Cable Television Consumer Protection and Competition Act[4] in 1992, it included § 555a (a), which provides that

> "[i]n any court proceeding * * * involving *any claim* against a franchising authority or other governmental entity * * * *arising from the regulation of cable service* or from a decision of approval or disapproval with respect to a grant, renewal, transfer or amendment of a franchise, *any relief*, to the extent such relief is required by any other provision of Federal, State, or local law, *shall be limited to injunctive relief and declaratory relief*" (47 USC § 555a [a] [emphasis added]).

The issue before us is whether plaintiffs' tort claim, which is predicated on the municipal defendants' decision to allow Rybacki to continue broadcasting defamatory speech, "aris[es] from the regulation of cable service" and is therefore defeated by the immunity provision.

By its plain and unconditional terms, § 555a (a) grants a local municipality broad immunity from monetary liability that arises out of "any" of the municipality's regulatory decisions involving cable television. We hold that the municipal defendants made a regulatory decision when they allowed Rybacki to continue on the air in the face of persistent complaints. Although we are mindful of the undisputed defamatory nature of Rybacki's broadcasts, our role is not to decide whether the municipality's decision was a good one; our focus is limited to whether the municipality "regulat[ed]" cable service, and we conclude that it did.

By statutory grant, the municipality is vested with authority to address allegedly defamatory programming (*see*, 47 USC §531 [b]). Based on that authority, the municipality promulgated what it aptly called "Regulations." By deciding to permit

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[4] Pub L No. 102-385, 106 Stat 1460 (codified as amended in scattered sections of 47 USC).

Rybacki to continue his broadcasts on their public access channel, the municipal defendants were engaged in "regulation" of cable service to no less a degree than had they stopped him.

Nothing in § 555a (a)'s legislative history diminishes the breadth of the immunity conferred by the statute's plain terms. We agree that, as plaintiffs point out, the immunity provision was motivated by the need to protect local franchising authorities "from being pressured into making unmeritorious franchising decisions by the threat of expensive damages litigation by cable companies" (*see*, 138 Cong Rec H6487, H6530 [July 23, 1992]). Indeed, the original provision passed by the Senate immunized local franchising authorities from monetary liability solely "in cases where the franchising authorities are charged with violating a cable operator's First Amendment rights arising from actions authorized or required by [the 1984] act" (HR Conf Rep No. 102-862, 102d Cong, 2d Sess, at 98, reprinted in 1992 US Code Cong & Admin News 1231, 1280). The scope of the statute's immunity was, however, significantly broadened during the course of the legislative process.

In the end, Congress expanded the Senate's original proposed immunity provision by adopting the significantly broader House amendment. The final version thus extends municipal immunity to "any claim * * * arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer or amendment of a franchise" (*see*, HR Conf Rep No. 102-862, *op. cit.*, at 99 [emphasis added]). If Congress was concerned exclusively with immunity from suits by aggrieved cable operators, it would not have deliberately enacted the additional sphere of immunity from any claims "arising out of the regulation of cable service."

The dissent would allow plaintiffs to maintain a defamation action for money damages, concluding that the right to such relief is not preempted by the 1984 and 1992 Acts. We disagree and rest our determination on the plain language of § 555a (a), which except for declaratory and injunctive relief, expressly

precludes "any claim against a franchising authority or other governmental entity * * * arising from the regulation of cable service * * *." Unlike the Federal statutes at issue in cases cited by the dissent, section 555a (a) leaves no room for guesswork or interpretation. Preemption is not implied; it is express. The statute unambiguously preempts "any relief, to the extent that such relief is required by any provision of * * * State, or local law."

At least one other municipality has successfully invoked section 555a (a) under facts analogous to these. The Eighth Circuit Court of Appeals, in *Coplin v Fairfield Pub. Access Tel. Comm.* (111 F3d 1395, 1408 [1997]), held that section 555a (a) immunized a municipality from monetary liability in a lawsuit arising out of the municipality's regulatory decision concerning programming content on its public access channel. In *Coplin*, however, the municipality decided to ban, rather than continue, a program that aired allegedly defamatory statements (*see*, *Coplin v Fairfield Pub. Access Tel. Comm.*, *supra*, at 1400). Like the municipal defendants here, the municipality in *Coplin* was sued because of the manner in which it regulated its public access channel's programming (*see*, *Coplin v Fairfield Pub. Access Tel. Comm.*, *supra*, at 1400). For purposes of our analysis, we see no meaningful distinction between *Coplin* and the case at bar. If cable television may be likened to a faucet of public information, one regulates the faucet no less by deciding to let it run than by turning it off.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

LEVINE, J. (dissenting). I respectfully dissent. Defendants are the Town of Woodstock, its Town Board and Public Access Committee, and the manager of the Town's public access cable television station. They do not contest the allegations of the complaint that for four years (between 1991 and 1995) Ronald Rybacki produced and hosted a weekly two-hour television program on the Woodstock public access cable channel in which

he regularly and repeatedly defamed and vilified in obscene terms plaintiffs Elizabeth Caprotti and her three sons. Just within the period of 90 days prior to the filing of plaintiffs' notice of claim, Rybacki made nine defamatory statements, characterizing Caprotti as a drug addict and a bisexual, who even indulged her addiction and sexual practices in the beauty shop she operates.

Defendants do not dispute that Caprotti repeatedly complained to them about Rybacki's attacks and remonstrated with them to take him off the air. Nor is it disputed that defendant had the legal power, under the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (47 USC §§521- 573) (hereinafter collectively referred to as the Cable Acts) and the Public Access Committee's own regulations promulgated thereunder, to withhold Rybacki's use of the public access channel for his constitutionally unprotected expressions (*see*, 47 USC § 531 [b], [c]; *Denver Area Educ. Telecommunications Consortium, Inc. v Federal Communications Commn.*, 518 US 727, 761-762; *McClellan v Cablevision of Connecticut, Inc.*, 149 F3d 161, 168 [2d Cir]). Nevertheless, defendants concede that they declined to take Rybacki off the public access channel or otherwise control his defamatory communications and, thus, Caprotti was compelled to endure the personal anguish, public humiliation and economic loss of beauty shop clientele from his televised attacks over that lengthy period.

Defendants do not contest that, by knowingly enabling Rybacki to spread his defamatory lies over the Town's public access cable channel, they facilitated Rybacki's publication of the libels and, therefore, are joint tortfeasors under New York common-law principles of defamation (*see*, *Youmans v Smith*, 153 NY 214, 218-219; *Anderson v New York Tel. Co.*, 35 NY2d 746, 750 [Gabrielli, J., concurring]; *see also*, *Hartmann v Winchell*, 296 NY 296, 304 [Fuld, J., concurring]).

The majority, however, has accepted the sole defense advanced here to defeat plaintiffs' State tort damage causes of

action, that 47 USC § 555a (a), added to the Cable Acts' statutory scheme by the 1992 Cable Television Consumer Protection and Competition Act, immunizes defendants from liability for monetary damages. Thus, the majority holds that section 555a (a) of the Cable Acts expressly preempts plaintiffs' damages claims. In doing so, the majority ignores principles of statutory interpretation the Supreme Court has imposed in applying the Supremacy Clause (US Const, Art VI, cl [2]) in express preemption cases.* The majority impliedly concedes that its expansive reading of section 555a (a) finds no support in the legislative history, merely finding that the legislative history fails to "diminish[] the breadth of the immunity conferred by the statute's *plain terms*" (majority opn, at 78 [emphasis supplied]). It leaves no doubt regarding its exclusive reliance on the plain meaning doctrine in finding express preemption. "We * * * rest our determination on the plain language of section 555a (a)" (majority opn, at 79). The majority supports its ruling with a Federal Circuit Court decision (*Coplin v Fairfield Pub. Access Tel. Comm.*, 111 F3d 1395 [8th Cir]) which is demonstratively distinguishable in two key respects and, if anything, supports the opposite conclusion. Application of the plain meaning doctrine to find that Federal law has expressly preempted plaintiffs' State tort damage causes of action is, in my view, contrary to United States Supreme Court canons of construction in this sensitive area of constitutional federalism. Indeed, in its most recent major preemption case, *Medtronic, Inc. v Lohr* (518 US 470), the Court expressly rejected exclusive reliance on a plain meaning approach. "Although our analysis of the scope of the pre-emption statute must *begin* with its text * * * our interpretation of that language does *not occur in a contextual*

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* Defendants have not contended and could not contend here that implied preemption applies, either by way of congressional occupation of the field or because State tort law conflicts with Federal law (*see, Drattel v Toyota Motor Corp.*, 92 NY2d 35, 42). Thus, the sole issue is express preemption under the Supremacy Clause.

vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption" (*id.*, at 484-485 [emphasis supplied, internal citations omitted]).

Both of the presumptions outlined in *Medtronic* are directly applicable here. First, as already discussed, we deal here with a claim of express preemption of a New York common-law remedy for tortious conduct. The Supreme Court has recognized that a State common-law tort remedy may well be considered to fall within the historic police powers of the State (*see*, *Cipollone v Liggett Group*, 505 US 504, 518; *Taylor v General Motors Corp.*, 875 F2d 816, 823 [11th Cir], *cert denied* 494 US 1065). Especially when this is the case, *Medtronic* teaches that

> "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated * * * in a field which, the States had traditionally occupied' * * * we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress*'" (*Medtronic, Inc. v Lohr*, *supra*, at 485 [emphasis supplied, internal citations omitted]).

This presumption not only applies to militate against a congressional intent to preempt at all, but also to limit and narrow the scope of any intended supersession of State law (*see*, *id.*, at 485; *Cipollone v Liggett Group, Inc.*, *supra*, at 518, 523).

The second proposition articulated in *Medtronic* is that "'the purpose of Congress is the ultimate touchstone' in every pre-emption case" (*Medtronic, Inc. v Lohr*, *supra*, at 494, quoting *Retail Clerks Intl. v Schermerhorn*, 375 US 96, 103). To discern the existence and the scope of any congressional intention to preempt State law, a court must look not only at the statutory language, but the legislative framework, the structure and purpose of the statute as a whole and a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law" (*Medtronic, Inc. v Lohr*, *supra*, at 486).

Based upon the analysis required by the United States Supreme Court in a case such as this, defendants have failed to demonstrate that plaintiffs' common-law damages remedy for defamation by these joint tortfeasors was expressly preempted by 47 USC § 555a (a). The text is manifestly far from plain, and its ambiguity works heavily against preemption (*see*, *Cipollone v Liggett Group*, *supra*, 505 US, at 533 [Blackmun, J., concurring in part with Kennedy and Souter, JJ.]; *id.*, at 548 [Scalia, J., concurring in part with Thomas, J.]):

> "In any court proceeding * * * involving any claim against a franchising authority or other governmental entity * * * *arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer, or amendment of a franchise*, any relief, to the extent such relief is required by any other provision of Federal, State or local law, shall be limited to injunctive relief and declaratory relief" (47 USC § 555a [a][emphasis supplied]).

Taken literally, plaintiffs' damage claims do not "arise[] from the *regulation* of cable service." Rather, their injuries arose from the *absence* of defendants' regulation of Rybacki's defamatory expressions. The majority overcomes this semantic hurdle by broadly interpreting the statutory phrase "regulation of cable service" to include "'any' of the municipality's regulatory decisions involving cable television" (majority opn, at 78), whereby, then, a decision *not* to regulate becomes "regulation." To bolster its conclusion that regulation includes nonregulation, the majority interposes the "any" in the statute as a modifier of "regulation." While the majority's expansive interpretation is not conclusively foreclosed by the text, it certainly is not compelled. Indeed, the United States Supreme Court, in another express preemption context, specifically rejected the contention "that the absence of regulation itself constitutes regulation" (*Freightliner Corp. v Myrick*, 514 US 280, 286).

Also of significance, while the text of section 555a (a) refers to "relief * * * required by any other *provision* of Federal, State

or local law," there is no specific exclusion of common-law remedies. "Courts finding no express preemption agree that the absence of any explicit reference to common-law actions in the preemption clause leads to a no-express preemption conclusion" (*Drattel v Toyota Motor Corp.*, *supra*, 92 NY2d, at 46).

Furthermore, neither the context nor the legislative history of section 555a (a) supports extending its statutory immunity to damage claims by private individuals who are not themselves subject to regulation by a franchising authority. Thus, the immediately preceding section, 47 USC § 555, gives *cable operators* access to the courts to seek relief from various adverse determinations by franchising authorities. The statutory scheme of the 1984 Cable Act left the primary means of regulating cable operations, facilities and services in the hands of local franchising authorities (*see*, *Time Warner Entertainment Co. v Federal Communications Commn.*, 93 F3d 957, 963 [DC Cir]). Local franchising authorities were given the power to establish and enforce requirements for facilities and equipment for the operation of a cable system (47 USC § 544 [b] [1]) and to regulate cable television service rates for subscribers in the absence of competition among operators (47 USC § 543 [a]).

Thus, the Cable Acts contemplate or provide for a variety of regulatory activities by franchising authorities beyond the determination to grant or deny a franchise to a prospective cable operator. Franchising authorities are also given some power to regulate the content of all cable programing through the franchise agreement and their regulations respecting "cable services [that] are obscene or otherwise unprotected by the Constitution" (47 USC § 544 [d] [1]). Therefore, to that degree, franchising authorities can also exert regulatory control over cable television performers, programmers and producers. It is all of these cable industry participants who section 555a (a) was intended to bar from suing for damages "arising from [their] regulation" by franchising authorities, not private parties who are not subject to any regulation under the Cable Acts.

Further fortifying the conclusion that 47 USC § 555a (a) was not intended to preempt State defamation claims is the provision in a companion section which specifically and expressly directs that "*cable operators* shall not incur any such *liability* [for defamation] for any program carried on any [public access] channel * * * unless the program involves obscene material" (47 USC § 558 [emphasis supplied]). Congress singled out cable operators, but not franchising authorities, for immunity from liability for defamations over public access channels because "the bill otherwise *prohibits the operator's editorial control over all such channels*"; (H Rep No. 98-934, 98th Cong, 2d Sess, at 95, reprinted in 1984 US Code Cong & Admin News 4655, 4732 [emphasis supplied]; 130 Cong Rec S14285, reprinted in 1984 US Code Cong & Admin News, at 4738 ["The Senate * * * adopts the explanation * * * contained in House Report 98-934"]; *see*, 47 USC § 531 [e]). As already shown and not disputed, however, franchising authorities *are* given the power to assert "editorial control" to prevent defamatory communications over public access channels. Congress therefore had every reason to leave franchising authorities accountable in damages for failing to exercise control over defamations on public access channels. It is quite apparent that the omission of franchising authorities from immunity for defamation liability in section 558 was intentional. The inclusion of cable operators but omission of franchising authorities in the only section of the Cable Acts dealing specifically with immunity from defamation liability adds a powerful *expressio unius est exclusio alterius* argument against the majority's application of section 555a (a) to give franchising authorities immunity from State defamation liability (*see*, McKinney's Cons Laws of NY, Book 1, Statutes § 240).

The legislative history reveals that the congressional intent behind 47 USC § 555a (a) as originally proposed and finally enacted was identical. In the original Senate version, it was intended to prevent coercive damage suits under 42 USC § 1983 and State civil rights laws, arising out of "any action expressly

authorized [by law] * * * including a franchising authority's decision to grant or deny a franchise, renew or not renew a franchise, to approve or deny the transfer of a franchise, amend or not amend a franchise, or *otherwise regulate a cable operator*" (S Rep No. 102-92, 102d Cong, 2d Sess, at 49-50, reprinted in 1992 US Code Cong & Admin News 1133, 1182-1183 [emphasis supplied]).

While the subsequently enacted House of Representatives version of section 555a (a) contains more generalized language than the Senate bill, the purpose, as articulated by its sponsor, then Representative Charles Schumer of New York, was the same: "to protect local authorities from being pressured into making unmeritorious franchising decisions by the threat of expensive damages litigation by cable companies" (138 Cong Rec H6487, H6530 [July 23, 1992]). Thus, the more generalized language of the House bill can best be read as intended to insure that the singular purpose of both Houses of Congress be effected–to prevent "strike" damage suits against local franchising authorities by disgruntled persons or corporate entities in the cable television industry who are subject to franchising decisions "or otherwise regulate[d]" by those municipal authorities.

Limiting the scope of statutory immunity from money damage liability to claims asserted by cable operators, producers and programmers of the cable industry who are subject to regulation by franchising authorities is consistent with the interpretation of section 555a (a) by every Federal court that has addressed that provision.

> "So far as we can tell, Congress gave local franchising authorities protection in order to insulate their decision-making from the threats of suits for damages brought by *disappointed cable operators*" (*Time Warner Entertainment Co. v Federal Communications Commn.*, *supra*, 93 F3d, at 980 [emphasis supplied]).

"We conclude that section 555a (a) promotes Congress's substantial interest *in having municipalities regulate cable operators* without fear of potentially overwhelming damage awards" (*Jones Intercable v City of Chula Vista*, 80 F3d 320, 326 [9th Cir; emphasis supplied]).

"Congress found that claims against municipalities for civil damage liability *related to their regulatory activities of the cable industry* were posing 'a potentially crippling burden' * * *. Elimination of that exposure is thus designed to *preserve the municipal franchising and regulations scheme* envisioned by the 1984 Act" (*Daniels Cablevision v United States*, 835 F Supp 1, 11-12 [D DC; emphasis supplied]).

Coplin v Fairfield Public Access Television Comm. (*supra*, 111 F3d 1395), relied upon by the majority, is not to the contrary. First, the plaintiff in *Coplin* brought a damage action under a Federal statute, 42 USC § 1983, allegedly for violating his constitutional rights to free speech when the talk show he produced and hosted was suspended by the local public access television committee for its libelous content. In contrast to the instant case, the plaintiff in *Coplin* did not assert any State common-law cause of action for damages. Thus, the court in *Coplin* could, if it wished, apply the plain meaning doctrine to 47 USC § 555a (a), free from the federalism-based constitutional constraints imposed by the Supreme Court where, as here, State common-law remedies are claimed to be superseded. Second, *Coplin* was a producer and programmer on the public access channel, and as such he was subject to content regulation by the franchising authority. Thus, dismissal of his section 1983 damages action was completely consistent with a reading of section 555a (a) limiting its application to bar damage suits by persons or entities subject to regulation by a franchising authority, and adversely affected by such regulation.

Since, in my view, defendants have completely failed to demonstrate any "clear and manifest purpose of Congress" to preempt plaintiffs' State common-law defamation damages action, I vote to reverse and reinstate the complaint.

Chief Judge Kaye and Judges Bellacosa, Smith and Wesley concur with Judge Rosenblatt; Judge Levine dissents and votes to reverse in a separate opinion; Judge Ciparick taking no part.

Order affirmed, without costs.

Opinion of the Appellate Division, Third Department
256 N.Y.App.Div.2d 978, 681 N.Y.S.2d 911

White, J.

Appeals (1) from an order of the Supreme Court (Torraca, J.) entered May 14, 1997 in Ulster County, which granted certain defendants' motion for summary judgment dismissing the complaint against them, and (2) from an order of said court, entered June 11, 1997 in Ulster County, which denied plaintiffs' motion for reconsideration.

We affirm Supreme Court's determination that a plaintiff who is defamed by materials broadcast over a public access cable television channel cannot obtain monetary damages from the franchising authority.[1]

In 1984, Congress enacted the Cable Communications Policy Act of 1984 (98 US Stat 2779) which, *inter alia*, authorized franchising authorities to require cable operators to set aside channels for public educational and governmental programming, which channels were intended to be the electronic equivalent of Hyde Park (*see, Daniels Cablevision v United States*, 835 F Supp 1, 6, *affd in part* 93 F3d 957). Commonly, the franchising authority retains a degree of control over these channels through nonprofit organizations or supervising boards that can set programming policy and approve or disapprove particular programming services (*see, Denver Area Educ. Telecom. Consortium v Federal Communications Commn.*, 518 US 727,759-761).

Congress revisited this field in 1992 when it enacted the Cable Television Consumer Protection and Competition Act of 1992 (16 US Stat 1460). Among the concerns that spawned this legislation were the franchising authorities' potential exposure to monetary damages arising from decisions approving or disapproving a franchise or from determinations implicating

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[1] Franchising authorities are governmental entities empowered to grant cable television franchises (47 USC § 522[9]).

the 1st Amendment (Cable Television Consumer Protection and Competition Act of 1992, HR Conf Rep No. 862, 102d Cong, 2d Sess). Congress addressed these concerns by enacting 47 U.S.C. § 555a (a), which reads as follows: "In any court proceeding * * * involving any claim against a franchising authority or other governmental entity * * * arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer or amendment of a franchise, any relief * * * shall be limited to injunctive and declaratory relief."

This statutory protocol found expression in the franchising agreement defendant Town of Woodstock entered into with Kingston Cablevision, Inc. (hereinafter Kingston). In return for the franchise, Kingston agreed to provide public access capability to the Town which formed a volunteer committee, defendant Woodstock Public Access Committee (hereinafter WPAC), to operate the station and promulgate rules and regulations governing its operation. According to plaintiffs' complaint, defendant Ronald Rybacki[2] used his weekly program to promote "a vicious campaign of harassment * * * against plaintiffs by making derogatory, inflammatory, obscene and defamatory remarks." Plaintiff Elizabeth Caprotti avers that she implored the Town and WPAC to enforce their regulations and remove Rybacki from the public access channel. Purportedly, because they refused to do so, plaintiffs commenced this action seeking, *inter alia*, compensatory and punitive damages. As indicated, Supreme Court dismissed it on the ground that it was barred by 47 USC § 555a.

Plaintiffs contend that Supreme Court misconstrued 47 USC § 555a, arguing that its only purpose is to protect franchising authorities from damage suits by aggrieved cable operators arising from franchise decisions. We construe the statute more broadly. In our view, the statute not only applies to franchising decisions but, because of its use of the disjunctive word "or",

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[2] Plaintiffs have obtained a default judgment against this defendant.

also to claims emanating from determinations relating to the regulation of cable services. We find support for our view in *Coplin v Fairfield Pub. Access Tel. Comm.* (111 F3d 1395), wherein the US Court of Appeals noted that franchising decisions were not the only concern Congress addressed in enacting 47 USC § 555a (*id.*, at 1408, n 7). It then proceeded to preclude a suspended talk show producer from seeking monetary damages against the franchising authorities, reasoning that his claim arose from the regulation of cable services (*id.*, at 1408). Also, as noted in *McClellan v Cablevision of Conn.* (149 F3d 161, 168, n 15), the statute limits a private cause of action to injunctive or declaratory judgment relief.

Likewise, plaintiffs' claim arises from the regulation of cable services as it is predicated upon the Town and WPAC's alleged failure to comply with the applicable rules and regulation governing the station's operation. Although plaintiffs' 1st Amendment rights were not abridged by defendants, the statute should nonetheless be applicable to them since the ability of a public access channel to provide a forum for robust and unrestrained public discourse would be jeopardized if viewers allegedly damaged by such programming could seek monetary damages from franchising authorities In any event, we note that 47 USC § 555a applies to "any claim" Accordingly, we conclude that plaintiffs may not seek monetary damages from the Town or WPAC.

Finally, as we find that plaintiffs' motion for reconsideration was in reality in motion for reargument, the denial of which cannot be appealed (*see, Spa Realty Assocs. v Spring Assocs.*, 213 AD2d 781,783), plaintiffs' appeal of Supreme Court's order entered June 11, 1997 must be dismissed.

Cardona, P.J., Mercure, Spain and Graffeo, JJ., concur. Ordered that the order entered May 14, 1997 is affirmed, without costs. Ordered that the appeal from order entered June 11, 1997 is dismissed, without costs.

Decision of the Supreme Court of the State of New York,
Ulster County, dated May 12, 1997

PRESENT: HONORABLE JOSEPH P. TORRACA, Supreme Court Justice.

Upon the foregoing papers, the request of all of the Defendants in the above captioned matter other than Defendant Ronald Rybacki, for summary judgment in their favor, is granted.

The actions of such Defendants with respect to the conduct of Defendant Ronald Rybacki here complained of, come completely within the purview of 47 U.S.C.A 555a in that it protects such Defendants with respect to any claim made against them in circumstances such as are here involved and limits the relief to injunctive relief. Inasmuch as Defendant Ronald Rybacki is no longer broadcasting with Woodstock Public Access Cable Television Station, no further relief can be afforded to plaintiffs.

The complaint is dismissed.

This shall constitute the decision and order of the Court in this matter. All papers submitted on this motion are forwarded for filing to KERR & WEISS, ESQS., 15 Plattekill Avenue, New Paltz, New York 12561.

Dated May 12, 1997
Kingston, New York

s/ JOSEPH P. TORRACA
Justice of the Supreme Court

Decision of the Supreme Court of the State of New York, Ulster County, dated June 30, 1997

PRESENT: HONORABLE JOSEPH P. TORRACA, Supreme Court Justice.

Upon the foregoing papers, Plaintiff's request, for an order granting reargument and renewal of this Court's order entered May 14, 1997, is denied in its entirety. It does not appear that the court has overlooked or misapplied any controlling principle of law, nor that it has overlooked its own prior ruling.

On the other hand, there does appear to be a misunderstanding of the full meaning of the aforesaid decision with the specific reference to the second to the last sentence thereof which reads "the complaint is dismissed." It was the intention of the Court that such dismissal was with respect to the movants only. That being the case, the Court had not overlooked the fact that default judgment had earlier been granted against Defendant Rybacki and the dismissal of the complaint at this juncture had no effect on the default judgment heretofore granted against Defendant Rybacki.

At this point, the Court will also remind Plaintiff that in making a motion for reargument or renewal, counsel should submit with moving papers, a copy of all of the papers submitted on motion complained of. Fortunately, in this instance, the absence of such documents does not affect the outcome of the motion.

In sum, the judgment heretofore granted to the Plaintiff against the defendant, Ronald Rybacki, continues to stand in full force and effect, but the complaint has been dismissed with respect to all of those Defendants who moved for dismissal of

same by virtue of the motion which resulted in the decision of this Court dated May 12, 1997.

This shall constitute the decision and order of the Court in this matter. All papers submitted on this motion are forwarded for filing to: KERR & WEISS, ESQS., Attorneys for Defendants, 15 Plattekill Avenue, New Paltz, New York 12561.

Dated: June 30, 1997
Kingston, New York

s/ JOSEPH P. TORRACA
Justice of the Supreme Court

STATUTES AND REGULATIONS

United States Constitution
Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 47, United States Code
(selected sections)

SUBCHAPTER V-A--CABLE COMMUNICATIONS

Part I–General Provisions

§ 521. Purposes

The purposes of this subchapter are to–

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

§ 522. Definitions

For purposes of this subchapter–

...

(4) the term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

(5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant nterest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(6) the term "cable service" means–

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to

provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system;

...

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

...

(16) the term "public, educational, or governmental access facilities" means –

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

...

(18) the term "State" means any State, or political subdivision, or agency thereof

§ 531. Cable channels for public, educational or governmental use

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(c) Enforcement authority

A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section.

(d) Promulgation of rules and procedures

In the case of any franchise under which channel capacity is designated under subsection (b) of this section, the franchising authority shall prescribe–

(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

(2) rules and procedures under which such permitted use shall cease.

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.

§ 532. Cable channels for commercial use

(a) Purpose

The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

...

(c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service; determination of rates

...

(2) A cable operator shall not exercise any editorial control over any video programming pursuant to this section, or in any other way consider the content of such programming, except that a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

...

(h) Cable service unprotected by Constitution; prohibition of offensive programming

Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such

cable service in the judgment of the franchising authority or the cable operator is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States. This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

§ 544. Regulation of services, facilities, and equipment

(d) Cable service unprotected by Constitution; blockage of premium channel upon request.

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

§ 555. Judicial proceedings

(a) Modification or renewal of franchises

Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1), 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in–

(1) the district court of United States for any judicial district in which the cable system is located; or

(2) in any State court of general jurisdiction having jurisdiction over the parties.

(b) Relief

The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section and with the provisions of subsection (a) of this section.

§ 555a. Limitation of franchising authority liability

(a) Suits for damages prohibited

In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer, or amendment of a franchise, any relief, to the extent such relief is required by any other provision of Federal, State, or local law, shall be limited to injunctive relief and declaratory relief.

b) Exception for completed cases

The limitation contained in subsection (a) of this section shall not apply to actions that, prior to such violation, have been determined by a final order of a court of binding jurisdiction, no longer subject to appeal, to be in violation of a cable operator's rights.

(c) Discrimination claims permitted

Nothing in this section shall be construed as limiting the relief authorized with respect to any claim against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, to the extent such claim involves discrimination on the basis of race, color, sex, age, religion, national origin, or handicap.

(d) Rule of construction

Nothing in this section shall be construed as creating or authorizing liability of any kind, under any law, for any action or failure to act relating to cable service or the granting of a franchise by any franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity.

§ 556. Coordination of Federal, State, and local authority

(a) States, political subdivision, State and local agencies, and franchising authorities

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety and welfare, to the extent consistent with the express provisions of this subchapter.

(b) State jurisdiction with regard to cable services

Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with his subchapter.

(c) Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed preempted and superseded.

(d) "State" defined

For purposes of the section, the term "State" has the meaning given such term in section 153(v) of this title.

§ 558. Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not occur such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements unless the program involves obscene material.

§ 559. Obscene programming

Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under Title 18 or imprisoned not more than 2 years, or both.

Regulations of Woodstock Public Access Committee,
Adopted by the Woodstock Town Board on July 19, 1994
(selected sections)

I STATEMENT OF PURPOSE

Woodstock Public, Education and Government Access cable television is a non-commercial, voluntary town-wide service that:

(1) furnishes access to local use of programming for the information and enjoyment of the general public and Woodstock cable subscribers,

(2) affords local artists, performers and producers an outlet for creative expression, and

(3) provides a community forum for the exercise of the right of free speech.

...

IV REGULATIONS

...

7 PROGRAM POLICIES AND RULES

A Presentation of the following materials on public access channel is prohibited:

...

2 Material which constitutes libel, slander, invasion of privacy, violation of trademark or copyright, or which violates any local, state or federal law.

3 Material which has a reasonable probability of creating an immediate danger of damage to property or injury to persons.

...

B When program content violations are brought to the attention of the WPAC, it may take such steps that are necessary to comply with WPAC regulations, and applicable local, state and federal laws.

WOODSTOCK TIMES
March 2, 1995
Page 1

"Dangerous stuff"

Local man uses cable channel to launch vicious attacks on woman and her family

By Sigrid Heath

"I will be talking about this forever, one way or another." With an apparently limitless and obsessive flow of verbiage, Ron Rybacki wages a campaign of hate and retribution over Woodstock's public access station, Channel 3. His use of the forum has been termed slanderous, invasive and menacing, and brought to light a cable committee in disarray and impotent, and a town board which does not want to pull the plug on Rybacki for fear of litigation.

In a lengthy telephone interview Tuesday, February 28, Rybacki said he could not claim that what is doing is "healthy, sane," and he confessed that "it doesn't make me feel good." He characterizes the content of his broadcasts as "deep stuff, dangerous stuff." He said he is living on disability benefits, and so has nothing to do but "read, write and think."

On Monday nights at 10, Rybacki goes on live with a rambling, sometimes morbidly fascinating, often repellant [sic] meditation on narcissism in Woodstock, sex, art, suicide, bio-energetics and other themes, all of which revolve around and return always to Elizabeth Caprotti, a Woodstock resident who runs a hair salon in town. Rybacki said that Caprotti, with whom he was once deeply in love, rejected him and accused him of molesting one of her children. This, said Rybacki, "opened a can of worms."

Caprotti alleges the molestation took place five or six years ago, "maybe longer." She was new in town, she said, and

lonely. Rybacki told her he was a therapist and she said, "I was interested in therapy." According to Caprotti, the relationship was over within a few weeks, but some months later her eight-year-old son told her Rybacki had molested him. Caprotti said the boy did not report it at the time because he said Rybacki had threatened to hurt her Caprotti told anyone.

Another Channel 3 producer, John Jordan, has come forward saying Rybacki confessed the alleged incident shortly after Caprotti reports it occurred and then recanted two days later. Jordan said he feels lousy about having kept quiet so long, but that he's finally "just had enough."

Rybacki contends Jordan is not telling the truth, and he says neither is Caprotti. "If she accuses me of child molestation," he says, "then I'll tell everyone Liz uses heroin."

Caprotti believes Rybacki is fueled by a desire to get back at her. And on the phone, Rybacki said, "Yes, I suppose I want revenge." Asked if his intention is to injure Caprotti, Rybacki said, "Consciously no. Unconsciously? Maybe I hate her and want to kill her." On the air Monday night, he told viewers, "I will never forgive her." He feels compelled, he said, to talk about everything he "knows" about her, "every detail." "She likes to seduce you, then murder you." He questions her motivation in accusing him of child molestation. "She has a death wish. Something is going to happen to her."

Caprotti says Rybacki does not limit his actions to the TV station. She says he has recently "said things" on the street in a manner which she says makes her concerned for the safety of her children. She filed the complaint with the police.

Rybacki denies the charge emphatically, saying, "I'm afraid of her kids. They have power over me."

Woodstock police Chief Paul Ragonese said he arrested Rybacki on February 24, charging him with second-degree harassment, a violation. Wednesday, in Woodstock Town Court, Rybacki was arraigned on the harassment charges. Caprotti obtained a temporary order of protection which, among other restrictions, specifies that Rybacki is not to speak of her

or mention the case on the air or elsewhere in public. The next hearing in the case will take place March 8.

This is the second order of protection Caprotti has had. She first went to the police about five years ago because Rybacki would follow her children from the bus and "lurked" in her yard, throwing gravel at her window. He admits that he violated the court order, but he was not prosecuted

Regarding his treatment of her on the show, Caprotti has been told the only thing she can do is sue for slander. And that will only cost her money she doesn't have. Rybacki, protected by the First Amendment, can continue to speak on the air, in any manner that suits him, as long as he is willing to risk being taken to court.

"It is a very complex, very difficult issue," observes Stephen Shaye, director of the division of municipal assistance at the New York State Cable Commission. Once the town dedicates a TV channel to public access, the municipality and its agents are prohibited by federal and state statutes from interfering in any way with an individual's right of free speech. The only control an entity can wield over what someone says on the air, said Shaye, is to create rules limiting access. The rules must be "fair, and treatment equal," and not intended to restrict free speech.

Rybacki and every other Channel 3 producer sign a statement agreeing to abide by regulations promulgated by the Woodstock Public Access Committee and adopted by the Town Board last July, which prohibit, among other activities, the presentation of "material which constitutes libel, slander, invasion of privacy."

Rybacki repeatedly violates the terms of the agreement. According to the regulations, he could be suspended by the station manager for these violations, and would have the right to appeal the matter to the access committee, and then to the Town Board. But the committee is crippled by three vacancies, leaving only two members, Peter Zeissner and Sonia Malkine.

And station manager Kay Talbot says she has been reluctant to act in what she perceives as an administrative vacuum.

Meanwhile Rybacki has continued to vilify Caprotti on the air. She said she's considered leaving town. Other children in school taunt her sons, repeating what they've heard Rybacki say about their mother on TV. Asked why she had let the situation go on for so long and not file a formal complaint until this week, she said, "I kept hoping he'd just stop." When she did look for guidance, she was disappointed.

"I went to Woodstock town supervisor John Mower in September," she said. "He told me to ignore it." Caprotti continued, "I know I'm ignorant about the law and how to get things done, but I haven't gotten very good help."

She said she called Mower at home late Monday night, February 27, during Rybacki's show, telling him, "Right now my private life is being made public. I'm a private citizen!" Caprotti said this time Mower said she should get a tape, that he needed proof. She has done so. And she has a stack of sworn statements of witnesses to Rybacki's "abuse" in earlier broadcasts.

But Mower, in an interview on Monday, said he doesn't think the town can do anything at all about Rybacki. "The town has been told, no matter what you think of it, content of programming is protected," Mower said. "Can the town be sued? Yes."

The agreement the Channel 3 producers sign indemnifies the town from any liability arising from claims. But District Attorney Michael Kavanagh said last week that document "might not be worth the paper it's printed on."

"If the town restricted content, we'd be in court," said Mower. "If I can't respond to content, how can I be responsible? This is the uncomfortable part of the Bill of Rights."

Woodstock attorney Alan Sussman, a Constitutional law expert, said the law "errs on the side of freedom of speech, but to tighten up on it would stop the free flow of debate." Public figures must take the knocks as part of the territory; a private

individual can seek relief in court, where the burden is on the "victim" to prove the allegations untrue.

Town Councilman Dale Hughes, an attorney, said Tuesday, he must support free speech. "If it's slander, she should sue him," said Hughes. He was unaware of the cable access committee vacancies.

Does the town have a responsibility to protect private citizens? Hughes pointed out there's no prior restraint where language is concerned.

Jordan read a statement at this week's Town Board meeting accusing the board [of] the town of "copping out" by allowing Rybacki to continue to broadcast and by "hiding behind" its indemnification. Mower said at the meeting he had "no response at this time." On the phone, the supervisor said he would "seek the wisdom of the town board."

Prior to his arraignment Wednesday, Rybacki, who equates his situation with the persecution of the Jews under the Nazis, said he would continue to say the things he does "because they tell me I can't." He defends his actions, saying, "Am I doing something evil? I don't think so. Let them all get TV shows of their own, and say whatever they want to about me. Gossip should be made public. It's healthier." He said he is ostracized by "the intellectual community," his life is threatened, and he has no choice but to do what he is doing.

"I've been called a child molester, what's next? A murderer? A potential murderer?" Asked if, perhaps subliminally, he wants someone to stop him, he answered, "No, I want someone I respect to come to me and say: I know this is painful for you to do this, but you must continue. I'll help you do it. If I thought it was destructive, I'd stop. But I don't think what I'm doing is destructive."

But Rybacki said Wednesday, "Maybe now that all this has come to a head I'll think about it. Maybe I'll stop."

Supreme Court, U.S.
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No. 99-1361

IN THE

Supreme Court of the United States

ELIZABETH CAPROTTI,

Petitioner,

v.

TOWN OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR TOWN OF WOODSTOCK RESPONDENTS

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COUNTER-STATEMENT OF THE FACTS AND THE CASE

The Town of Woodstock (Town) is an authorized franchiser of public access cable television, under 47 U.S.C. § 522 and New York State Public Service Law § 219. Beginning in 1986, the Town contracted with Kingston Cablevision, Inc. for the operation of a cable television system. Pursuant to the terms of the contract, Kingston Cablevision agreed to provide public access capability to the Town. The Town thereupon created a volunteer committee, known as the Woodstock Public Access Committee (WPAC), which formulated rules and procedures to be used in the operation of the public access channel.

Respondents herein are the Town, its officials, employees, and the volunteer members of the WPAC. Petitioner, who is a private individual, brought this action asserting that a program aired on respondents' public access television channel which was hosted and produced by Ronald Rybacki was, *inter alia*, defamatory and caused intentional emotional harm.[1]

Following the completion of discovery, respondents moved for summary judgment on the grounds that 47 U.S.C. § 555a(a) limits plaintiff to injunctive and declaratory relief. At the time respondents moved for summary judgment, Rybacki's show was no longer broadcasting. The petitioner cross-moved for partial summary judgment on the issue of liability. The New York Supreme Court, Ulster County,

---

1. Ronald Rybacki was also named as a defendant in petitioner's action. Mr. Rybacki defaulted and the proceedings herein do not apply to the petitioners' judgment against him.

granted respondents' motion, dismissing the claim on the ground that respondents' actions with regard to petitioner and Mr. Rybacki fell under the immunity provision of § 555a(a) and, therefore, petitioner's remedy was limited to injunctive relief.

These decisions were later affirmed by both the New York Appellate Division – Third Department, 256 N.Y. App. 2d 978, 681 N.Y.S.2d 991 (3d Dept. 1997), and the New York Court of Appeals, 74 N.Y.2d 37, 699 N.Y.S.2d 707 (N.Y. 1991). The New York Court of Appeals in its review of the petitioner's appeal of the lower Courts' decision stated that "[t]he issue before us is whether 47 USC §555a(a) immunizes the municipality from liability for monetary damages." *Id.* at 37. Thereafter, it concluded that the petitioner's "claim arises from the regulation of cable service" and upheld the dismissal of petitioner's complaint against the respondents. *Id.*

Contrary to petitioner's representation it its statement of "The Present Action", respondents have not conceded that Rybacki's statements were defamatory per se or whether, if substantiated, respondents are jointly liable with Rybacki for defamation or negligence. *See* Petition for Writ of Certiorari, p.5. Furthermore, respondents have not admitted that "they were 'publishers' of the alleged defamatory statements under New York common law, and would otherwise be jointly liable to petitioner." *Id.*

SUMMARY OF THE ARGUMENT

Petitioner presents questions of whether Section 635A(a) of the Cable Television Consumer Protection and Competition Act of 1992 (the Act), codified at 47 U.S.C.

§ 555 a(a), preempts the petitioner's State common law and tort claims for money damages against the respondents, a municipal franchising authority, its officials and employee. Petitioner argues that the New York Court of Appeals improperly held that 47 U.S.C. § 555a(a) immunizes municipalities from liability for monetary damages when a claim brought by a private individual against the municipality arises from the regulation of cable service. According to the petitioner, the language of the statute does not expressly preempt state law causes of action and any bar on lawsuits which the statute may have should not be extended to private persons. Furthermore, petitioner asserts that she has been deprived of all rights to recover damages for defamatory broadcasts made on public access stations operated by a municipality.

1. The plain language of 47 U.S.C. § 555a(a) clearly preempts a private individuals' state common law tort claims for money damages against a municipal franchising authority. § 555a is headed "Limitation on franchising authority liability" and subsection 555a(a) is entitled "Suits for damages prohibited". The language of the statute clearly states that

> any court proceeding pending on or initiated after October 5, 1992, involving any claim against the franchising authority or governmental entity, or any official, member, employee or agent of such authority or entity, arising from the regulation of cable services or from a decision of approval or disapproval with respect to a grant, renewal, transfer or amendment of a franchise, any relief, to the extent such relief is required by any provision of federal, state, or local law, shall be limited to injunctive relief and declaratory relief.

42 U.S.C. § 555a(a). The statute unequivocally states that monetary damages for "any claim which arises from the regulation of cable services" are prohibited. Accordingly, the Court need not go beyond the language of the statute to determine that Congress intended for any private lawsuits seeking claims for money damages as against municipal franchising authorities are not permitted.

2. Petitioner is not deprived of judicial recourse for those injuries which she may have suffered as a result of illegal conduct. First, as against the franchising authority, an aggrieved individual may seek injunctive and declaratory relief. In addition, a private individual is not limited in the remedies she may seek from the producer of the subject broadcast. As in this case, the victim of the alleged illegal conduct can seek recourse against the alleged perpetrator of the illegal actions.

3. There is no conflict between the decisions of the New York Court of Appeals and United States Circuit Court cases. Petitioner relies on *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir. 1996) and *Time Warner Entertainment Company, LP v. Federal Communications Commission*, 93 F.3d 957 (D.C. Cir. 1996) to assert that § 555a(a) has a limited purpose of protecting local franchising authorities in damage suits brought by aggrieved cable system operators over franchising decisions. However, petitioner's reliance on these cases to create an alleged conflict is simply misapplied. Each of these cases involved parties within the cable industry. There is no language within the holding of either the Ninth Circuit or the District of Columbia Circuit which asserts that the protection afforded to the municipality is not also extended to claims made by private individuals. Indeed, neither of the

Circuit Court decisions address claims made by private individuals. Therefore, there is no conflict in the lower courts' decisions which must be resolved by this Court.

4. The New York Court of Appeals' holding does not conflict with this Court's established principles of preemption. The language of § 555a(a) clearly identifies the domain which is expressly preempted by the language of the statute. However, if one is to look beyond the language of the preemptive statute to review the statutory framework and Congressional intent, such review will also reveal that Congress had the expressed intent of preempting lawsuits brought against municipal franchising authorities, regardless of whether they were brought by cable operators or private individuals. The Congressional intent specifically addresses its concerns of excessive damage liability which could be imposed upon municipal franchising authorities. Moreover, the scope of the statute's immunity was significantly broadened during the course of the legislative process in enacting the subject statute. Therefore, Congress' expansion of the protection to include all claims which may be brought against the franchising authority is clearly evident within the Congressional record.

5. Petitioner's equal protection argument should not be considered because it was not addressed by the Court below. However, the preemption of private tort actions for monetary damages is consistent with Congress' grant of immunity from liability where such immunity has been explicitly granted and there is a legitimate governmental interest for their action. Here, Congress' interest was to protect municipalities from costly damages awards. Therefore, petitioner's equal protection rights have not been violated.

REASONS FOR DENYING THE WRIT

I.

THE STATUTORY LANGUAGE OF § 555a(a) IS CLEAR AND UNAMBIGUOUS.

A. The Preemptive Language of Section 555a(a) identifies Congress' clear and manifest purpose of precluding any money damage claims against municipal franchising authorities.

It is well established that an inquiry into the legislative intent of the statute must be primarily discerned from the plain language of the statute. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). When the statutory text is clear, there is no need to turn to its legislative history for explanation of its meaning. *Ratzlaf v. U.S.*, 114 S. Ct. 655, 510 U.S. 135 (1994); *Barnhill v. Johnson*, 112 S. Ct. 1386, 503 U.S. 393 (1992).

The language of § 555a(a) is clear and unambiguous. *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395, 1407 (8th Cir. 1997). The language of the statute is as follows:

> Section 555a. Limitation of franchising authority liability.
>
> (a) Suits for damages prohibited.
>
> In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental

> entity, or any official, member, employee, or agent of such authority or entity, arising from the regulation of cable service or from a decision of approval of disapproval with respect to the grant, renewal, transfer, or amendment of a franchise, any relief, to the extent such relief is required by any other provision of federal, state, or local law, shall be limited to injunctive relief and declaratory relief.

42 U.S.C. § 555a(a). Under the plain language of the statute, a municipal franchising authority is immune from any suits arising from its regulation of cable service. Certainly, there is no limitation stated or implied in the immunity extended to any action by a franchising authority which involves the regulation of the content carried on public access cable services. *Coplin*, 111 F.3d at 1408.

Similar to the petitioner in *Coplin*, petitioner in the pending action is attempting to create an ambiguity in the language of the Act where none exists. The nucleus of petitioner's claim is that the respondents improperly regulated the actions of Ronald Rybacki when he produced a program on Woodstock's local public access cable television station. Such claim, by its nature, is exactly what is addressed in the plain language of § 555a(a). Therefore, any monetary relief which petitioner seeks from this franchising authority is expressly barred by the statute.

B. Petitioner's reliance on *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), is misapplied.

Medtronic clearly states that, in addressing preemption, "Congress' intent, of course, primarily is discerned from the

language of the preemption statute and the 'statutory framework' surrounding it (citations omitted)." 518 U.S. at 485. Once the domain which is preempted is identified, there is no reason to go beyond the language of the statute. *Id.* at 484.

In *Medtronic, Inc.*, this Court addressed the issue of whether there was federal preemption of state tort liability for medical devices under the Medical Device Amendments of 1976 (MDA). There, it was held that the state products liability claims involving an allegedly defective pacemaker were not preempted by the MDA which prohibits States from maintaining any requirement different from or in addition to the requirements under the MDA. The plurality opinion of the Court was based on an analysis of the legislative history and content of the statute. It was from that interpretation that this Court concluded that Congress did not intend to preempt the particular tort claims in that case.

There, Justice Stevens, in writing the plurality opinion for the Court, began by considering the plain language of the preemption language. However, when an ambiguity arose regarding the subject statute, the court turned to an inquiry beyond the language to determine Congress' intent. *Medtronic*, 518 U.S. at 489. Justice Stevens specifically points out that if Congress intended to include all common law causes of action, it would have used language such as "remedy" rather than "requirement" in the language of the statute. *Id.*

In the pending matter, however, an ambiguity in the statutory language does not exist. Congress does not hide its intent to preempt all causes of action against the municipal franchising authorities related to its regulation of cable

stations. First, the subject section of the Act is headed "Limitation of franchising authority liability" and "Suits for damages prohibited". Second, the statute specifically refers to "any claims" which arise from the regulation of cable service which are brought after October 5, 1992. In addition, Congress further extended the immunity, by using the conjunction "or" to add that the immunity also extends to any decisions with respect to the grant, renewal, transfer or amendment of a franchise. It is clear from the plain language of the statute that Congress intended to extend the protection from costly damage liability to all claims, regardless of whether they were brought by cable operators or any other entity.

C. Field and Conflict Preemption should not be considered.

Petitioner also submits that preemption is not appropriate because there is no field or conflict preemption between the state and federal law. However, an analysis of field or conflict preemption is unnecessary. An inquiry as to whether state law is preempted by a conflict with federal law or whether federal law occupies the legislative field, is only necessary when there is an absence of an express Congressional command in the language of the statute. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). That simply is not the case here. In sum, the structure and purpose of the statutes' preemption language is clearly stated with the words of the statute. Therefore, any further inquiry into Congressional intent is not required.

D. The Congressional Intent Supports Preemption.

Assuming *arguendo*, that the analysis of Congressional intent required a review of the Congressional record, the

resulting immunity to franchising authorities would remain the same. The Congressional record confirms the plain language of the statute that preempts damage claims brought by any individuals. As stated by the Ninth Circuit in *Jones Intercable of San Diego, Inc.*, "[s]ection 555a(a) promotes Congress's substantial interest in having municipalities regulate cable operators without fear of potentially overwhelming damage awards." 80 F.3d at 326; *see also* Leglislative History of the Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, *reprinted in* Congressional Information Services, Inc., 92 CIS PL 102385, 102 CIS Legis. Hist. P.L. 385 (1992) (stating under the Summary of Legislative History that the Act "limits the liability of cable franchising authorities in lawsuits arising from cable service franchising *and* regulation [emphasis added].")

Moreover, the New York Court of Appeals specifically addressed this issue and found that the Congressional Record supported the expressed preemption of monetary damages claims brought by private individuals, like that of petitioner, against municipal franchising authorities. They stated, in pertinent part,

> Nothing in §555a(a)'s legislative history diminishes the breadth of the immunity conferred by the statute's plain terms. We agree that, as plaintiffs point out, the immunity provision was motivated by the need to protect local franchising authorities "from being pressured into making unmeritorious franchising decisions by the threat of expensive damages litigation by cable companies" (see, 138 CongRec H6487, H6530 [July 23, 1992]). Indeed, the original provision passed by the Senate immunized local franchising authorities from monetary liability solely "in cases where the

> franchising authorities are charged with violating a cable operator's First amendment rights arising from actions authorized or required by [the 1984] act" (HR ConfRep No. 102-862, 102d Cong, 2d Sess, at 98, reprinted in 1992 US Code Cong & Admin News 1231, 1280). The scope of the statute's immunity was, however, significantly broadened during the course of the legislative process.
>
> In the end, Congress expanded the Senate's original proposed immunity provisions by adopting the significantly broadened House amendment. The final version thus extends municipal immunity to "any claim * * * arising from the regulation of cable service or from a decision of approval or disapproval with respect to a grant, renewal, transfer or amendment of a franchise" (see, HRConfRep No. 102-862, op. Cit., at 99 [emphasis added]). If Congress was concerned exclusively with immunity from suits by aggrieved cable operators, it would not have deliberately enacted the additional sphere of immunity from any claims "arising out of the regulation of cable service."

74 N.Y.2d 37.

In light of the foregoing, Congress' intent to provide immunity to the franchising authorities from claims brought by cable operators *and* other private entities is expressed in both the language of the statute and in its legislative history. Therefore, the language of § 555a(a) of the Act undeniably grants respondents immunity from petitioner's claims.

II.

THERE IS NO CONFLICT IN THE LOWER COURT DECISIONS.

Plaintiff attempts to create a conflict between the Courts where none exist. The New York Court of Appeals' interpretation of § 555a(a) does not conflict with those of the Courts of Appeals for the Ninth and District of Columbia Circuits. Relying on *Time Warner Entertainment Company, LP v. Federal Communications Commission*, 93 F.3d 957 (D.C. Cir. 1996) and *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir. 1996), petitioner asserts that these circuits have held that "the sole purpose of the statute was to protect local franchising authorities from damage suits brought by aggrieved cable systems operators over franchising decisions." *See* Petition for a Writ of Certiorari, page 25. This analysis, distorts the Courts' holdings and improperly places limitations on the protection afforded by § 555a(a) to municipal franchising authorities.

In *Time Warner Entertainment Company, LP*, the petitioners were cable television systems owners, operators, and programs who brought an action challenging the constitutionality of certain sections of the Act and the Cable Communications Policy Act of 1984. 93 F.3d at 962. Among the provisions challenged was 47 U.S.C. § 555a(a). There, the petitioners argued that "by prohibiting damages against municipalities, this section prevents cable operators from protecting their First Amendment rights and permits municipal licensing authorities to censor the contents of cable operators' speech." *Id.* at 980. However, the D.C. Circuit disagreed with such reasoning. In upholding the constitutionality of § 555a(a) the Court stated that it could

not understand "how giving local franchising authorities immunity from damages amount to direct restriction on the speech of cable operators". *Id.* It further stated that all of the aggrieved's remedies were not restricted since declaratory and injunctive relief was still permitted. *Id.*

In analyzing whether this provision could prevent free speech, the Court mentions that Congress sought to give municipal franchising authorities protection from threats of suits by cable operators. However, nothing in the language of the Court's decision, or in the actual statute, in any way limits the immunity only to suits asserted by cable operators. Indeed, the protection is extended to "any claims", regardless of whether it is an individual, corporation or other entity bringing the suit.

In *Jones Intercable of San Diego*, a cable television operator brought suit against the City alleging that the City had violated its federal statutory and constitutional rights when it refused to permit the operator to operate cable television systems in areas which were newly annexed by the City without first obtaining a citywide franchise. 80 F.3d at 322. Again, it was argued that § 555a(a) violated the cable operators' First Amendment rights. However, the Court held that the plaintiff's rights were not violated and the Court concluded that § 555a(a)

> promotes Congress's substantial interest in having municipalities regulate cable operators without fear of potential overwhelming damage awards. The statute is aimed at improving Congress' scheme for regulating cable systems, not at suppressing particular view points held by cable system operators. * * *

> Legislative findings of the damage claims municipalities face before the civil immunity provision became law demonstrate that Congress' goal of giving municipalities the ability to regulate without fear of large damage awards would not be served as well absent the provision. Moreover, any relaxation of the prohibition on damages would impose some regulatory cost on the city.

Id. at 326.

Each of the Circuit Courts' interpretation of the purpose of § 555a(a) supports respondents' immunity from the action brought by petitioner. Since Congress' intent was to protect municipalities from "overwhelming damage awards", this protection must extend to claims brought by both cable operators and any other individuals who bring suit as a result of a municipal franchising authority's regulation of its cable service.

III.

PETITIONER HAS OTHER MEANS OF JUDICIAL RECOURSE.

Petitioner argues that she has been stripped of her judicial recourse in recovering damages for the defamation against her. This is simply untrue. It is obvious from the language of the statute that individuals may bring an action for injunctive or declaratory relief if they believe that their rights have been violated. 47 U.S.C. § 555a(a). In addition, since the statutory immunity is limited to claims brought against franchising authorities and its officials, employees or agents, an aggrieved party can still maintain an action against a

producer, or other publisher of a show, when an alleged illegal broadcast has been aired.

In the pending action, the petitioner has used the other judicial recourse available to her. Indeed, petitioner has brought an action against Ronald Rybacki, the producer and show host who made the statements about petitioner on a public access television program. Petitioner has obtained a default judgment in her action against Rybacki and an inquest is pending.

Also, petitioner sought injunctive relief to terminate Rybacki's television show. However, Rybacki's show was no longer broadcasting at the time the respondents moved for summary judgment in the lower Court. Therefore, such application became moot.

IV.

PETITIONER'S EQUAL PROTECTION RIGHTS ARE NOT VIOLATED.

Petitioner's equal protection argument was not raised in the Court below, and therefore, is not properly raised before this Court. However, an inquiry into Congress' intent in enacting § 555a(a) clearly demonstrates that it had a "rational basis" for the immunity granted to municipal franchising authorities.

The Equal Protection Clause of the Fourteenth Amendment guarantees that classifications imposed by law will not be used to arbitrarily burden a group or class. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, 99 S. Ct. 1355, 1367 (1979). It is well established that

where the classifications are not based on race, gender, religion or alienage, and the law is considered to be social or economic in nature, the law will be permitted to stand as long as it is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 3254 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 97 S. Ct. 2513, 2516 (1976).

It is undisputed that the applicable standard to apply in reviewing the constitutionality of § 555a(a) is a "rational basis" test. *See* Petition for Writ of Certiorari, Point IV. It is further established that, as stated above in Point I, Congress granted the immunity afforded to municipal franchising authorities because of its goal to give municipalities the ability to regulate its cable operation without fear of large damage awards. *Jones Intercable of San Diego, Inc.*, 80 F.3d at 326. This governmental interest clearly justifies, and is a rational basis for, Congress' preclusion of monetary damage awards in actions against the municipal franchising authorities. *Id.* at 327. Therefore, petitioner's equal protection argument fails.

CONCLUSION

In light of the forgoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

ELIZABETH CAPROTTI,

Petitioner,

v.

TOWN OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF OF *AMICI CURIAE* NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS AND ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The *Amici Curiae* — The New York State Conference of Mayors and Municipal Officials and The Association of Towns of the State of New York (jointly the "Amici") — represent approximately 1400 units of local government in New York State. These local governments comprise almost every village, town, and city in New York State. The specific interest of each Amici is as follows:

1. The New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit voluntary membership association consisting of 556 of the State's 620 cities and villages, thereby representing the majority of such municipalities. NYCOM provides ongoing education, information and training to village and city officials in all aspects of the cable franchising regulatory process.

2. The Association of Towns of the State of New York is a not-for-profit voluntary membership association established in 1933 by town officials. From its inception, membership support has been strong and has grown to over 97% of New York State's 932 towns. Thus, our membership includes local governments that have been delegated franchising authority pursuant to the Cable Television Consumer Protection and Competition Act of 1992. The Association provides ongoing education, information and training to town officials in all aspects of the cable franchising regulatory process.

A town in New York State is a general purpose, home rule municipal corporation. New York State has 932 statutorily created towns covering the entire area of the State (outside of cities). Towns are the most numerous and diverse

class of local government within New York State. The 1990 census of town populations ranged from 47 in Montague to approximately 716,000 in Hempstead. Towns vary in their physical characteristics, their constituencies, and the services they provide. At the same time, all towns are similar in their basic governmental structures and responsibilities.

Like the Respondent, the Amici firmly believe that the ruling of the New York State Court of Appeals should stand and that New York's municipalities, as the franchising authorities for cable operators, should be immune from state tort claims. The federal statute is clear in its intent and scope and thus protects municipalities from claims such as the petitioner's third-party claim for defamation. As illustrated below, the Amici submit this brief to show the detrimental impact that municipalities will suffer if they are required to censor private parties who seek access to the many public, educational, and government channels contained in the majority of franchise agreements. Subjecting these franchising authorities to monetary damage claims would frustrate Congress's intent.

SUMMARY OF THE ARGUMENT

Certiorari should not be granted in this case because the Court has no issue that is ripe for adjudication. Every court in New York State has determined that the petitioner was afforded every legal remedy available to her under the Cable Television Consumer Protection and Competition Act of 1992. Unsatisfied, petitioner is seeking further judicial redress to have this Court create a new and additional remedy.

Congress provided petitioner with injunctive and declaratory relief regarding any dispute she may have with the municipal cable franchising authority. 47 U.S.C. § 555a. The purpose of providing injunctive relief against a local franchising authority is to afford petitioner a judicial remedy to have the programmer's show removed from the public access channel. Congress expressly and unmistakably intended to insulate local franchising authorities from costly monetary damages. Moreover, Congress provided petitioner with compensatory relief against the cable programmer. 47 U.S.C. § 558. Congress recognized that the cable programmer should be monetarily responsible for any damages resulting from the content of his program — not the local franchising authority. Essentially, petitioner seeks to have this Court supplant the Congressional intent for her own gains by seeking monetary relief from the taxpayers.

The respondent's actions amounted to and arose from the regulation of cable service. Establishing rules and regulations for the use of public access channels includes the determination whether to broadcast a particular program. Thus the plain and ordinary meaning of the word "regulation" must include channel access decisions. Furthermore, Congress clearly and unmistakably chose to immunize franchising authorities from costly monetary damages in order to preserve the public's access to the electronic soapbox. Congress recognized that First Amendment issues arise when governmental entities regulate the content of free speech.

Finally, Congress's intent to preempt petitioner's claim for monetary damages against the local franchising authority is clear. Congress expressly provided petitioner with

injunctive and declaratory relief against the local franchise authority. Congressional intent is the "touch stone" of preemption analysis. Congress chose to convey its intent in the clearest form of preemption — a preemption clause. Moreover, Congress used the plainest words possible. Finally, Congress could have chosen to preserve petitioner's state common law claim against respondent in the savings clause 47 U.S.C. § 556 — but it did not. Furthermore, every court that has been called to determine the scope of the preemption clause has concluded that the only relief against a local franchising authority is injunctive and declaratory. Thus this court should not grant petitioner's request for certiorari because there is no issue to resolve.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE MUNICIPALITIES, AS CABLE FRANCHISING AUTHORITIES, ARE IMMUNIZED FROM THIRD-PARTY STATE LAW CLAIMS SUCH AS DEFAMATION.

A. *Given the plain meaning of 47 U.S.C. § 555a, the municipality regulated cable service within the meaning of the Act even when it declined to remove a private citizen's broadcast from its public access channel.*

In New York, local municipalities act as the franchising authorities for cable operators and thus their authority consists of "a set of statutory and regulatory laws specifying what cable operators are allowed to do." *Glendora v. Kofalt*, 162 Misc. 2d 166, 174, 616 N.Y.S.2d 138, 144 (Sup. Ct. Westchester County 1994). To determine what Congress

intended when it limited claims against franchising authorities, this Court need not explore the legislative history of the statute when the statutory language is clear on its face. *See Ratzlaf v. United States*, 510 U.S. 135, 147-8 (1994). When the written words are easily understood, the Court should not seek to create an ambiguity. *Barnhill v. Johnson*, 503 U.S. 393 (1992); *Coplin v. Fairfield Public Access Television Comm.*, 111 F.3d 1395, 1403 (8th Cir. 1997). The Court should presume that the legislature set forth its intentions and thus no other interpretations of the language need to be read into the printed words. *See United States v. Union Elec. Co.*, 64 F.3d 1152, 1165 (8th Cir. 1995).

The relevant portion of Section 24 of the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter the 1992 Cable Act) states:

> In any court proceeding pending on or initiated after October 5, 1992, involving any claim against a franchising authority or other governmental entity . . . arising from the regulation of cable service . . . any relief, to the extent such relief is required by any other provision of Federal, State, or local law, shall be limited to injunctive or declaratory relief.

47 U.S.C. § 555a(a) (1994).

Thus franchising authorities are immunized from any liability for damages arising from their regulation of cable service. Aggrieved parties may seek either declaratory or injunctive relief, but may not pursue monetary damages. Although petitioner takes issue with the phrase "arising from the regulation of cable services," franchising authorities

regulate cable services by their very nature when they establish a franchise agreement with a cable operator setting forth the terms and conditions of the franchise.

The term "regulation of cable services" has been found to be clear and not unconstitutionally vague. *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir. 1996). In *Jones*, the court interpreted, inter alia, whether the city had regulated cable services when it declined to allow the plaintiff to install more cable infrastructure and to service customers without a city-wide franchise. 80 F.3d at 324. The court noted that the term "regulation of cable services" was clear. *Id.* at n.3. People of ordinary intelligence would not have to guess at the meaning of the phrase. *See Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). Like the city of Chula Vista, the Town of Woodstock "regulated cable service" when it created a committee to establish rules governing the use of the PEG channels. Whether the petitioner agreed with the manner in which the rules were applied is a separate issue that should not be addressed by this court. The fact remains that the Town clearly regulated cable services within the meaning of 47 U.S.C. § 555a.

Even if the Court finds that the term "regulation of cable service" is unclear, the legislative history of this statute amply demonstrates that Congress sought to protect local governments, as the franchising authorities, from monetary damage claims, including defamation claims, brought by third parties. The Cable Communications Policy Act of 1984 (codified at 47 U.S.C. §§ 521-559 (1994) (hereinafter 1984 Cable Act) allowed franchising authorities to require "channel capacity be designated for public, educational, or governmental use," and to "require rules and procedures for the use of such channel capacity." 47 U.S.C. § 531(b)(1994). Cable operators

were required to provide PEG channels to municipalities in exchange for franchising authorities granting cable operators the ability to proceed in the municipal right-of-way. One purpose of the 1984 Cable Act was to guarantee diversity of information sources and services to the public. H.R. Rep. No. 98-934, at 30 (1984). Congress envisioned public access channels as

> the video equivalent of the speaker's soap box or the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. No. 984, 98th Cong., 2d Sess. at 30, 45 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (explaining statutory definition of PEG access). With the increased access, however, came an increased use of public access channels to also promote hate speech and indecent material. *See Missouri Knights of the Klu Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1349 (W.D. Mo. 1989). In response, Congress further regulated the cable industry and readdressed cable access in the 1992 Cable Act. The 1992 Cable Act protects municipal franchising authorities from lawsuits stemming from cable operators and also from cable programmers. A logical extension of this provision is to protect franchising authorities from state law claims made by third-parties who have ample recourse to pursue their claims directly against the individual who may have caused the harm.

B. *Immunizing franchising authorities from state law claims does not violate the First Amendment because PEG channels are akin to a public forum and thus franchising authorities may not regulate the content of speech on these channels.*

The constitutional protections of freedom of speech "protects the individual against actions by governmental authorities, not by private persons." *Glendora*, 162 Misc. 2d at 173. Because Congress intended public access channels to be used for free speech purposes, the PEG channels are open to all speakers and are akin to any other public forum in a municipality. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Once an open forum is created, the government cannot pick and choose speakers based upon the content of the speaker's ideas.

Requiring a franchise authority to censor the content of programming on public access channels such as the petitioner urges, would subject a franchise authority to unlimited actions alleging First Amendment violations both by those who seek to be on the air and by those who disagree with the messages broadcast. *See McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161, 165 (2d Cir. 1998). Courts have already held that protecting less marketable speakers' access on a cable system is an important governmental interest and that the PEG provisions are compatible with that interest. *See Daniels Cablevision Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993).

When the Cable Act of 1992 was passed, cable operators complained that their First Amendment rights were abridged because the operators lacked editorial control over the content of programming on leased access and PEG channels. *Daniels*

Cablevision, 835 F. Supp. at 11. Although the *Daniels* case involved complaints by cable operators over the "must-carry" provisions of the 1992 Cable Act, the minor restriction on the operators' First Amendment rights expanded citizens' ability to exercise their First Amendment rights through a more open forum in which to speak. By forbidding cable operators to have editorial control, Congress effectively made operators into information conduits. Franchising authorities, like the cable operators, also merely act as a conduit for the speech of unrelated parties. Thus franchising authorities should be treated more akin to internet service providers who are not considered publishers of material. 47 U.S.C. § 230(c)(1); *see Blumentahl v. Drudge*, 992 F. Supp. 44, 49-52 (D.D.C. 1998); *Zeran v. America Online*, 129 F.3d 327, 331-32 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding that knowledge of defamatory content on internet is not sufficient to subject ISPs to liability).

Granting immunity to franchising authorities for state claims arising out of the regulation of cable service is both compelling and narrowly tailored to meet the government's interest in promoting a municipality's ability to provide for a free and open marketplace of ideas through the use of its PEG channels. Thus 47 U.S.C. § 555a is narrowly tailored to prevent municipalities from seeking to regulate content.

Finally, municipalities in New York are not permitted to regulate speech pursuant to the N.Y. Public Service Law § 229(2) (Consol. Supp. 2000): "No municipality may prohibit or limit any program . . . in any manner that would tend to encourage or discourage programming of any particular nature, directly or indirectly."

C. *Public policy favors limiting a franchise authority's liability for monetary damages in state law claims such as defamation because aggrieved third parties still have adequate remedies available at law.*

Section 555a neither burdens an individual's right to free speech on a public access channel, nor restricts the ability of third parties to seek lawful redress of actionable claims directly from the private individuals causing the harm. Both declaratory and injunctive relief are sufficient deterrents to abusive conduct by municipalities as regulatory authorities. *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 980. (D.C. Cir. 1996); *Daniels Cablevision*, 835 F. Supp. at 12; *Jones Intercable*, 80 F.3d at 326-27 (*citing Bush v. Lucas*, 462 U.S. 367 (1983)). In fact, prior to the 1992 Cable Act Congress found that claims against municipalities relating to the regulatory activities were posing "a potentially crippling burden" on local governments (S. Rep. No. 92, 102d Cong., 1st sess. 48-50 (1991)) thus the immunity provisions are necessary. Thus the legislative history demonstrates an intent to free franchising authorities to be able to act without fear of reprisals and lawsuits by cable companies. A beneficial corollary effect is that municipalities are insulated from third party claims because such claimants can seek redress in other arenas.

The 1984 Cable Act permits, but does not require, franchising authorities to mandate PEG access as a franchise condition. Municipalities often seek PEG access as a means of opening the airwaves to their citizens. If municipalities will be subjected to defamation actions by third party claimants, municipalities, as the franchising authorities, will be unwilling to seek PEG channels in their franchise agreements and thus Congress's intention to open up the PEG

channels as akin to the proverbial street corner will have been frustrated. Instead, franchising authorities should be protected from state tort claims such as defamation because these PEG channels provide a forum for robust and unrestrained public disclosure.

The Petitioner is also not denied her day in court as she can seek injunctive or declaratory relief from the franchising authority. She is also free to pursue monetary damages directly from the private individual that allegedly engaged in defamation and the intentional or negligent infliction of emotional distress. The presumption that municipalities have "deep pockets" is inappropriate and taxpayers should not have to foot the bill for a cause of action that really belongs between two private individuals.

Finally, the Court need not read an implied remedy into section 555a because this petitioner already has a compensatory remedy available to her. Congress explicitly preserved petitioner's state common law remedy against the programmer through 47 U.S.C. § 558. This section provides that: "Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers . . . pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws . . ." Therefore, Congress has expressly provided petitioner with a compensatory remedy against the cable access programmer alleged to have defamed her.

II. PETITIONER'S COMMON LAW TORT CLAIM FOR DEFAMATION IS PREEMPTED BY THE FEDERAL CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 (CABLE ACT).

Federal law may preempt state common law tort remedies. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311-19 (1981); *Goldstein v. California*, 412 U.S. 546 (1973); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). *See also Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991) (noting that the preemption doctrine applies to common law rules and jury awards of damages). The preemption doctrine is derived from the Supremacy Clause of the United States Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 427 (4 Wheat. 1819). Thus a state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (*citing Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Although there is a judicial presumption against preemption, courts must look for evidence that the preemption was the "unmistakably clear" purpose of Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) ("preemption fundamentally is a question of congressional intent"); *English v. General Elec. Co.*, 469 U.S. 72, 78-79; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (the "ultimate touchstone" of preemption is Congressional Intent)). Congress's intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone*, 505 U.S. at 516 (*citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In the case at bar, Congress explicitly restricted claims against franchising authorities to those seeking injunctive or declaratory relief.

A. *Congress Expressly Preempted State Common Law Damage Remedies in "Unmistakably Clear" Language.*

A preemption clause in the federal statute is the most common indicator of express preemption because a preemption clause clearly demonstrates a congressional intent to preempt. *Medtronic*, 518 U.S. at 471. Thus courts will not need to infer preemption when the statute is clear on its face and contains an express preemption provision. *Cipollone*, 505 U.S. at 517. Based upon statutory construction principles that seek to first determine whether the language used by the legislature has a clear and unambiguous meaning, (*Beecham v. United States*, 511 U.S. 368 (1994)) Congress has clearly expressed its intent to preempt state common law damage actions by using a preemption clause drafted in plain unambiguous language.

The 1992 Cable Act expressly preempts petitioner's state common law tort action for money damages. Congress used the words: "Federal, State or local law" in defining the realm of the preemption clause. 47 U.S.C. § 555a(a). The ordinary meaning of the word "law" includes "common law." Moreover, this court has noted that "state law" includes "common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 517. Thus it is difficult to imagine that this court would need to parse the plain and ordinary words that Congress chose to express its intent to preempt petitioner's damages claims. This court is not being asked to decipher whether Congress intended to preempt state common law damage claims in words like "requirement or prohibition" or "State statute or regulation" as in *Cipollone*. Here, Congress has plainly and expressly said that any other provision of a "Federal, State or local law, shall be limited

to injunctive relief and declaratory relief." 47 U.S.C. § 555a(a). Moreover, Congress provided extra assurances with the enactment of a "rule of construction clause." which notes that

> [n]othing in this section shall be construed as creating or authorizing liability of any kind, under any law, for any action or failure to act relating to cable service or the granting of a franchise by any franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity.

47 U.S.C. § 555a(d).

The plain language of the statute "clearly and unmistakably" preempts petitioner's common law defamation action for damages. Thus the New York State Court of Appeals correctly held that petitioner was preempted from recovering money damages against the Town of Woodstock, the Woodstock Public Access Committee and its members. *Caprotti v. Town of Woodstock*, 94 N.Y.2d 73, 699 N.Y.S.2d 707 (1999).

B. *The Scope of the Preemption Clause Should be Read Broadly.*

A preemption clause also defines the scope and extent of the federal statute's preemption. *Cipollone*, 505 U.S. at 517. Once a statute has an express preemption clause, courts use statutory construction to identify the scope of the preemption to determine the domain preempted. (Betsy J. Grey, Make Congress Speak Clearly: Federal Preemption of State Tort Remedies, 77 B.U. L. Rev. 559, 567-68 (1997)).

Petitioner would have this court narrowly construe the scope of Section 555a to apply only to cable operators (Brief for Petitioner at page 13). The New York Court of Appeals, however, disagreed with petitioner. "By its plain and unconditional terms, § 555a(a) grants a local municipality broad immunity from monetary liability that arises out of 'any' of the municipality's regulatory decisions involving cable television." *Caprotti*, 94 N.Y.2d at 73. Thus, the New York Court of Appeals recognized, as should this court, that Congress clearly intended to insulate municipalities (i.e. taxpayers) from costly money damages in all circumstances arising from the regulation of public access programming.

Moreover, two federal circuit courts have already determined that Section 555a is available to cable access programmers and not just cable operators. *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395 (8th Cir. 1997) (immunizing a municipality from monetary liability in a lawsuit arising out of the municipality's regulatory decision concerning programming content on its public access channel.); *McClellan v. Cablevision of Conn. Inc.*, 149 F.3d 161, 168 (2d Cir. 1998) (holding that actions against local governments regarding the regulation of cable access programming could result only in declaratory or injunctive relief.) Thus, because the jurists who have reviewed the language and scope of Section 555a(a) have been clear in its application, review of this issue is not ripe.

Moreover, not only did Congress expressly and broadly insulate municipalities from money damage claims in the preemption clause (47 U.S.C. § 555a) they choose not to preserve common law damage claims in the savings clause (47 U.S.C. § 556). Thus, if Congress had intended to narrow

the scope of the preemption clause they could have preserved damage claims pursuant to state common law tort actions in a savings clause as they have done in other statutes. *See* Federal Aviation Act of 1958 (FAA), 72 Stat. 731, as amended, 49 U.S.C. App. § 1301, *et seq.*, "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. App. § 1506). Even in the savings clause (codified at 47 U.S.C. § 556(a)) Congress preempted all state laws that are inconsistent with the Cable Act. Section 556 of the Act, provides that "[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provision of [Title VI] (emphasis added)." A state common law tort action for monetary damages would not be consistent with Section 555a(a) which expressly provides that the only remedy against a local government is for injunctive and/or declaratory relief and thus is expressly preempted.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

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IN THE

Supreme Court of the United States

ELIZABETH CAPROTTI,

Petitioner,

v.

TOWN OF WOODSTOCK *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of New York

REPLY TO BRIEFS OF RESPONDENTS AND *AMICI CURIAE*

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PRELIMINARY STATEMENT

> Good name in man and woman...is the immediate jewel of their souls: Who steals my purse steals trash...But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.[1]

Petitioner Elizabeth Caprotti submits this reply in response to the respondents' brief in opposition, and to the brief of the *amici curiae*.[2]

This case raises important questions of federalism and pre-emption of State common-law defamation claims. It provides an opportunity to clarify the law governing so-called "PEG" (public, educational and governmental) channels on cable television. This Court does not appear to have addressed the subject since *Denver Area*[3] in 1996 (Petition, Point IV at 23-4, and 28 n. 16).

The brief of the *amici*, arguing that certiorari should be denied, on the contrary powerfully demonstrates the significance of this case. The *amici* show that defamation on public access cable television is an ongoing issue, that it affects many more persons than this one petitioner, and that municipalities face serious liability for defamation on the public access stations

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[1] *Othello*, Act III, Scene iii.

[2] On April 14, 2000, the *amici* filed a motion for leave to file this brief erroneously stating (at 1), due to a misunderstanding between counsel, that petitioner had refused to consent. The previous day, petitioner's counsel had submitted a letter of consent to the Court.

[3] *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). The *amici* erroneously state that PEG channels are a public forum (Br. at 8), a conclusion that the *Denver Area* plurality specifically refused to reach . See Petition at 28 n. 16.

which they operate. Their responsibilities and the rights of the viewing public should be clarified.

The respondents and the *amici* argue that municipal franchising authorities should have absolute unqualified immunity from all common-law tort liability arising from the speech of a public access programmer to whom they have given a forum. They argue this despite that they alone decide who can broadcast and that they alone can restrain or remove programmers who violate their rules against defamation. They are already immune from claims by programmers who have been removed[4]; now they seek blanket immunity from claims by the general public as well.

Respondents' "sweeping interpretation of the statute would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the...[petitioner's] injuries." *Medtronic, Inc. v Lohr*, 518 U.S. 470, 488 (1996)(footnote omitted).

This is not an issue of censorship, as the *amici* claim (Br. at 2), but of the simple tort law obligation to use reasonable care when there is a duty. Defamation is unprotected by the First Amendment and stopping it is not censorship. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1939).

When a private person is defamed in print or on radio or commercial television (outside the context of matters of public importance), no First Amendment issue arises.[5] Moreover, the

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[4] *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395 (8th Cir.1997), Petition at 26-8.

[5] Broadcasters are strictly liable for defamation uttered on their stations, even absent prior notice. *Hartmann v. Winchell*, 296 N.Y. 296 (1947); *Coffey v. Midland Broadcasting Co.*, 8 F.Supp. 889 (continued...)

spectrum scarcity issue, which applies to broadcast media and limits the reach of the First Amendment, does not apply to cable television.[6] In effect, respondents demand an unqualified "public access privilege" against defamation. There is no such privilege and there is no reason to create one.

POINT I

THERE ARE NO ISSUES OF FACT; RESPONDENTS MISSTATE THE RECORD.

Respondents say that they "have not conceded that Rybacki's statements were defamatory per se or whether, if substantiated, respondents are jointly liable with Rybacki for defamation or negligence [or] that they were 'publishers' of the alleged defamatory statements under New York common law, and would otherwise be jointly liable to petitioner." Br. at 2.

The record demonstrates otherwise. In their summary judgment motion and appellate briefs, their only argument was that 47 U.S.C. § 555a was a complete defense. Were there any factual issues, summary judgment would have been denied. The Court of Appeals majority said that there were no issues of fact:

> [Petitioner] alleges that [Rybacki] used his program to wage a vicious campaign of harassment against her by repeatedly defaming her and her three sons...on television. Plaintiffs assert that despite their complaints to members of the municipality's Town Board and WPAC, the municipality refused to stop Rybacki's defamatory

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[5](...continued)
(W.D.Mo.1934); Annot., *Defamation by Radio or Television*, 50 A.L.R.3d 1311 (1973).

[6] *Denver Area, supra*, n. 2, 518 U.S. at 748.

broadcasts, and thereby willfully failed to comply with the Regulations. *The nature of these allegations is not in dispute...*[and] *we are mindful of the undisputed nature of Rybacki's broadcasts.* (2a, 5a)(emphasis added).

In his dissenting opinion, Judge Levine said:

[Respondents] *do not contest the allegations of the complaint* that...Ronald Rybacki... regularly and repeatedly defamed and vilified in obscene terms plaintiffs Elizabeth Caprotti and her three sons... *Defendants do not dispute* that Caprotti repeatedly complained to them about Rybacki's attacks and remonstrated with them to take him off the air. *Nor is it disputed* that defendant had the legal power...to withhold Rybacki's use of the public access channel for his constitutionally unprotected expressions... Nevertheless, *defendants concede that they declined to take Rybacki off the public access channel or otherwise control his defamatory communications...Defendants do not contest that*, by knowingly enabling Rybacki to spread his defamatory lies over the Town's public access cable channel, *they facilitated Rybacki's publication of the libels and, therefore, are joint tortfeasors under New York common-law principles of defamation.* (7a-8a)(emphases added).

Thus, this case presents purely legal questions.[7]

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[7] Analogously, Internet service providers are "publishers" of defamatory statements which they fail to remove from computerized bulletin boards. *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir.1997), *cert.den.*, ___U.S.___, 118 S.Ct. 2341 (1998). In *Zeran*, 47 U.S.C. § 230 was held to be a complete defense to a defamation claim. The question here is whether 47 U.S.C. § 555a(a) (continued...)

POINT II

"REGULATION OF CABLE SERVICE" IS AMBIGUOUS IN THE PRESENT CONTEXT.

Respondents and the *amici* argue that the phrase "regulation of cable service" is "clear and unambiguous" and that "an ambiguity in the statutory language does not exist." Resp. Br. at 6 and 8; see *Amici* Br. at 3 and 6. But statutory language can be clear in one context and unclear in another.

In *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320 (9th Cir.1996)(Petition at 24-25), the Court said that the phrase was not unconstitutionally vague in the context of a claim brought by a cable operator. 80 F.3d at 324 n. 3. However, this does not require the same conclusion in the context of a claim brought by a private citizen.

The distinction is drawn in *Medtronic, supra* (Petition at 18-20). The statute there barred States from establishing "any requirement" regarding medical devices, and the issue was whether a common-law tort claim was a "requirement." This Court said that even if the statute were construed as an express pre-emption, so that "we need not go beyond that language to determine whether Congress intended...to pre-empt at least some state law,...we must nonetheless identify the domain expressly pre-empted by that language." 518 U.S. at 484 (citation and quotation marks omitted).

There is no basis to extend the statute to an entirely different domain, and thereby pre-empt petitioner's claims. "[I]f Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it." 518 U.S. at

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[7](...continued)
should be similarly construed, despite vastly different language, Congressional intent and public policy. *Cf. Lunney v. Prodigy Services Co.*, 94 N.Y.2d 242 (1999), *pet. for cert. filed*, No. 99-1430.

487. "Requirement" did not pre-empt the tort claims in *Medtronic*; "regulation" does not do so here.

The word "regulation" also has different meanings depending upon the context. *Compare Cipollone*[8] ("the term 'regulation' most naturally refers to positive enactments by [legislatures], not to common-law damages actions") with *Silkwood*[9] and *Medtronic, supra*, 518 U.S. at 488-91 (tort remedies have only indirect regulatory effect).

Respondents and the *amici* argue that the phrase "regulation of cable service" should be broadly interpreted. But the presumption goes the other way; pre-emption is always narrowly construed. For example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court held that appointed state judges were not "employees" within the meaning of the Age Discrimination in Employment Act. "We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges." 501 U.S. at 467 (citation omitted; emphasis in original).

"Thus, it is [respondents'] burden to show that Congress intended to preclude such [damage] awards" (*Silkwood, supra*, 464 U.S. at 255), and their burden to show that "regulation of cable service" was intended to include private defamation claims. They have not done so.

Respondents also misstate the meaning of the savings clause, 47 U.S.C. § 556. The *amici* say that "Congress could have chosen to preserve petitioner's state common law claim against respondent in the savings clause 47 USC § 556 – but it did not." (Br. at 4). However, the essence of federalism–under the

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[8] *Cipollone v. Liggett Group*, 505 U.S. 504, 519 (1992)(Petition at 18-19)

[9] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)(Petition at 20).

Supremacy Clause and the Tenth Amendment–is that State common-law claims are *never* pre-empted, unless and until Congress says otherwise. This is the plain meaning of § 556(a), which says that local authority over "matters of public health, safety and welfare" is preserved. See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)(savings clauses of the Clean Water Act permitted New York common-law damage action for water pollution which occurred in Vermont). Thus the savings clause preserves petitioner's claims in State court.

POINT III

IMPLIED FIELD AND CONFLICT PRE-EMPTION ANALYSES ARE REQUIRED, EVEN IF THERE IS EXPRESS PRE-EMPTION.

Citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), respondents argue that because petitioner's claims are expressly pre-empted, there can be no implied field or conflict pre-emption analysis (Br. at 9). This is incorrect. In *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995)(Petition at 18-19), this Court said, "[a]ccording to respondents and the Court of Appeals, [*Cipollone*] held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. This argument is without merit." 514 U.S. at 287. "Petitioner's pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law...A finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS [anti-lock braking system] devices, since none exist." 514 U.S. at 289-90.

There are "no federal objectives or purposes" with respect to State common-law defamation claims brought by private persons, and there is no federal interest in pre-empting them,

absent countervailing First Amendment considerations.[10] Thus, even if respondents' broad interpretation of "regulation of cable service" were correct, they would still lose on an implied field or conflict pre-emption analysis. Petition, Point III at 21.

POINT IV

INJUNCTIVE AND DECLARATORY RELIEF ARE UNAVAILABLE REMEDIES.

Respondents and the *amici* argue that petitioner has remedies despite pre-emption of her damage claims, because § 555a(a) does not bar an injunction or a declaratory judgment. However, neither of these remedies is available.

It is well established that a court of equity does not generally have the power to enjoin defamation, because prior restraint on speech violates the First Amendment, and because there is an adequate remedy at law, *viz.* damages. *Alberti v. Cruise*, 383 F.2d 268 (4th Cir.1967); *Wolf v. Gold*, 193 N.Y.S.2d 36, 9 App.Div.2d 257 (1st Dept.1959).

Declaratory relief is meaningless, because it is undisputed that petitioner has been defamed. There is nothing for a court to declare because the issue is not controverted. Damages are the appropriate remedy for defamation, and they are historically the only remedy. Petition, Point I, at 14-18.

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[10] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); Petition, Point I at 14-17.

POINT V

THE EQUAL PROTECTION ARGUMENT WAS RAISED BELOW AND HAS NOT BEEN WAIVED.

Respondents claim that the issue of equal protection was waived because it was not raised below (Br. at 15). This is incorrect. Petitioner's brief in the Court of Appeals said:

> From the perspective of a libel plaintiff, there is no basis for treating a cable television station differently from a broadcast station, and there is no basis for treating a cable television station operated by a municipality differently from one operated by a private company. Any such rule would dictate a different result for a libel plaintiff depending solely upon the form of ownership and control. This would raise serious constitutional questions of due process and equal protection of the laws. Pet. Br. at 20.

Thus, the equal protection argument is preserved in this Court. Even if the argument had not been raised below, this Court can still address it. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991)("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.")

On the merits, respondents and the *amici* misstate the equal protection issue. The appropriate test is a rational basis, rather than strict scrutiny, inasmuch as the classification is not an inherently suspect one. The interpretation of the Court of Appeals majority creates a distinction based solely upon the form of ownership and control of a public access cable television

station. That distinction may have a rational basis with respect to suits by cable system operators over franchise awards; the purpose of § 555a to protect municipalities from such suits makes that much clear. However, a private defamation plaintiff's right to recover can not rationally depend upon the form of ownership and control of the station. There is no such distinction with respect to any other media, and no rational reason for one here.

CONCLUSION

For the foregoing reasons, this petition should be granted.

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